

10 May

THE
Legal Judicature
IN
CHANCERY
STATED.

With REMARKS on a late Book,
intitled,

*A Discourse of the Judicial Authority
belonging to the Master of the Rolls in
the High Court of Chancery.*



L O N D O N :

Printed for J. WALTHOE, over-against the
Royal Exchange in Cornhill. M,DCC,XXVII.

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30d

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THE author of a late discourse of the judicial authority of the Master of the Rolls, hath therein communicated to the publick several records, citations and remarks, in order to make out, and establish, that there are two judges in the court of Chancery, not ^a co-ordinate, but in a subordination of the one to the other. ^b The Chancellor supreme, and the Master of the Rolls, the subordinate Judge. That the law invests the Master of the Rolls with a jurisdiction, by virtue of his office, in aid of the jurisdiction of the Chancellor, not co-ordinate with it. ^c That some persons observing, that Masters of the Rolls have been joyn'd with Judges

^a Pag. 7.

^b Pag. 8.

^c Pag. 11.

and Masters in Chancery, in special commissions to hear and determine causes in Chancery, have entertain'd a superficial opinion, that the Master of the Rolls hath no judicial authority, but what he derives from such commissions.^a And that there is not the least foot-step of any delegation from the Chancellor to the Master of the Rolls, to hear causes, to be found amongst all the memorials of the court.^c And tho' the great seal, which is the King's seal, and the seal of the court, be in the actual custody of the Chancellor, yet whosoever hath regularly obtained any order, or decree, in the court (amongst which he reckons decrees^f made by the Master of the Rolls alone) is entitled, *ex debito justitiæ*, to demand the proper process of execution under the seal of the Court, and neither the King nor his Chancellor can by law refuse it.^g And that the Master of the Rolls, exercising judicial authority, instead of diminishing the Lord Chancellor's power, does enlarge it.

I have read over several of our law-books, statutes, records, and writings, where these matters are likely to be found; but I can truly say, that I have not met with any law-book, statute, or record, that ever asserted two distinct Judges, the one supreme, the other subordinate, to be in the court of Chancery: much less that the supreme Judge was bound, *ex debito justitiæ*, to execute the decrees,

^a Pag. 124. ^c Pag. 39, 40. ^f Pag. 116. ^g Pag. 10.

and orders of the subordinate Judge; which last proposition is hardly to be reconciled to common understanding; for he who is *ex debito justitiæ* to execute the sentences, and decrees of another Judge in the same court, is in reality the subordinate Judge himself.

I am the more confirm'd that there is no such thing to be met with, in any book or record whatsoever, because the author of the said discourse, who, as he himself saith, p. 12. *hath examined this matter to the bottom, and hath made a thorough search into the records at the Tower and the Rolls Chapel, and as full a search into the register books, as the great number of those large volumes will admit, or indeed was necessary; and hath likewise carefully look'd into law books, and other printed books, besides manuscripts,* hath not produced any one authority, wherein it is expressly said, that there are two Judges in the court of Chancery, and that the Master of the Rolls, by virtue of his office, is a Judge in the court: But the way that he hath taken to prove those propositions, is by induction, and enumeration of facts, and from thence drawing consequences, and inferences, to establish the truth of such propositions.

I think the author is mistaken in some of his facts, and that his inferences, from such of them wherein he is not mistaken, are not always just and conclusive; and what is more,

several facts necessary to bring this matter to a clear determination are omitted; which, when stated, will put many of the facts mentioned by him in quite another light and view.

To determine therefore this matter, and to make it clear and perspicuous, it will be necessary to take into consideration the original frame and constitution of the court of Chancery, and of the judicial power exercised therein; in explaining and establishing whereof, I shall take notice of several parts of the said discourse, either as I go along, or in a distinct chapter by it self. And when the true and ancient constitution of the court shall be explained and established, the facts contained in the said discourse, as well those that are particularly taken notice of in this, as those that are not, will be set in such a light, that every reader will easily apply them himself, and see how far they do, or do not go to prove what they were brought for.

The author of the discourse hath spent several pages, to prove that the office of Master or Keeper of the Rolls, is, in the nature of it, proper to have judicial power; and hath alledg'd several reasons from conveniency, that it should be so, and from inconveniency, if it should not be so; but this is only a specious and plausible way of arguing, because the question in this case is not upon propriety or impropriety, conveniency or inconveniency;

niency; every man, according to his *different* apprehension, will have *different* reasonings on such general questions: But the point here is on a matter of fact, whether it *be so*, or *not so*; and therefore, in the ensuing Discourse, I shall apply my self to shew what, in fact, is the *true* and *ancient* frame and constitution of this court, and to that end, I shall endeavour to prove the following propositions.

I. That the Chancellor is sole Judge on the common law side, in the Court of Chancery.

II. That the Chancellor is sole Judge of equity in the Court of Chancery.

III. That in the Chancery there are several Clerks and Officers under the Chancellor; and that particularly by the constitution of the court, there are twelve Ministerial Officers, called *Clerks*, or *Masters in Chancery*, (whereof the *Master*, or *Clerk of the Rolls*, is one) who are Assistants to the Lord Chancellor, but yet subject to his orders and direction, and by him from time to time deputed and assigned to such business as the exigency or state of the Court requires.

IV. That

IV. That the Master of the Rolls is no Judge either in Law or Equity, in the Court of Chancery; but whatsoever judicial power he hath lawfully exercis'd, hath been either as one of the twelve Masters of Chancery, or by virtue of the King's commission.

CHAP. I.

That the Chancellor is sole Judge on the common law side, in the Court of Chancery.

IN the Chancery are two Courts, or rather two Manners of Power; the one ordinary, wherein the Proceedings are according to the laws and statutes of the realm; the other extraordinary, according to the rules of equity, *secundum æquum & bonum*.

The first institution of this court, was for matters of justice; and, consider'd as a court of law, in its ordinary jurisdiction, is *immemorial*, or *before time of memory*.

This court, as a court of law, had heretofore great extent of jurisdiction, and multiplicity of business: From hence issued original Writs for determining property or injury in the King's Bench or Common Pleas.

All

All commandments upon any occasion for the safety of the realm, or the good government thereof, were heretofore by Writs, and pass'd under the Great Seal.

Whilst tenures remain'd as they were at the common law, and especially before the erection of the court of Wards, there was much more law-busines in this court than now there is.

To this day there are held in this court pleas of *scire facias's*, for repeal of the King's letters patents, of petitions, *monstrans de droit*, traverses of offices, *scire facias* upon recognizances, executions upon statutes and pleas of all personal actions, by, or against any officer, or minister of this court.

By this short view it appears that the matters determined in the Chancery, according to the rules and methods of law, must, in times past, have created much business in this court; and that at this day there must be sometimes proceedings in this court according to law.

It will seem very strange that there should be any difficulty to know who is the Judge of this court, which hath had so much business in it, and which is the first of the four principal courts of the kingdom, and hath been so time out of mind, past all remembrance or record.

Chancery and Chancellor are relative terms, the former being derived from the latter,

latter, as is observed both by Sir *Robert Cotton*, in his manuscript, cited by the author, and also by Mr. ^a *Cambden*; and as in common understanding, the one is the name of the court, so the other is the name of the Judge of that court, and in such manner are used in records and acts of parliament.

The author of the discourse doth for the most part express himself in general terms, concerning the jurisdiction of the Master of the Rolls, on the law side of Chancery; as, *that he^b hath, and always had jurisdiction on the common law side of the court of Chancery, by virtue of his office.* ^c *That he hath judicial authority, —* ^d *That he acts judicially by virtue of his office,* and the like. Which general words do not convey any perfect determinate meaning, but I suppose are intended to affirm what in other places he expressly saith, that the Master of the Rolls is in law, as well as equity, *a subordinate Judge* in the court of Chancery.

What the office of a Judge is, may be easily apprehended; but what the office of a *subordinate Judge* in the same court is, can't well be comprehended; this is a term perfectly new, and invented only to support the author's modern system, in opposition to the received law of the land, that the Chancellor is sole Judge in Chancery.

^a *Britann. Discourse on the Law-courts of Engl. p. 255.*
^b *Pag. 41.* ^c *Pag. 48.* ^d *Pag. 55.*

That the Chancellor is a Judge of law, in this court, is not deny'd by the author; the proof therefore of *a subordinate Judge* must lye upon *him*; and must be made out by authorities, by the acts and practice of the court, and such like proper arguments. And as to this I dare venture to ask him, whether there be any book antient or modern, or any one record, act, or ordinance of parliament, that ever asserts any other person to be the Judge on the law side of the court of Chancery, besides the Chancellor? or whether there be any memorial of any *one* judgment, in any cause on the *law side* in Chancery, but what is given by the Chancellor?

There is not the least foot-step, that I can find, of any such thing: Nay I would go further, and ask another question; whether all the law-books, acts of parliament, records, and other publick acts, do not speak of the Chancellor, as the only Judge of law in Chancery?

It would be endless to go through all the publick acts, and particularly the acts of parliament, which speak of, describe, or suppose the Chancellor to be the only Judge.

The 11 *E. 1.* of *Acton Burnel*, which gives the statute merchant, and the 27 *E. 3. c. 9.* which gives the statute staple, suppose the Chancery to be the court, and the Chancellor to be the Judge.

The 28 E. 1. c. 5. *the King wills that the Chancellor, and the Justices of his Bench, i. e. the Chancery, and the King's Bench, do follow him.*

By the 25 E. 3. c. 2. it is made High Treason to slay the *Chancellor*, Treasurer, the Justices of the one Bench, or the other, Justices in Eyre, or Justices of Assize, and all other Justices assigned to hear and determine, *being in their places*, doing their offices. — If any other, besides the Chancellor, had been a Judge in this court, it can't be presum'd but that like care would have been taken of him.

2 H. 5. c. 5. If the clerks of the Chancery, under whose names original writs go forth written, shall leave out the party's addition, prescribed by that statute, they shall be punish'd, and make a fine to the King, *by the discretion of the Chancellor.*

24 H. 8. c. 5. The act concerning the explanation of wills, enacts, §. 19. That the party within that clause, upon exhibiting the bill in the King's court of Chancery, shall have such contribution or recompence, as by the *Chancellor*, or *Keeper* for the time being, shall be thought good and convenient.

Among many other statutes to this purpose, are 2 H. 5. c. 8. 2 H. 5. c. 9. 36 E. 3. c. 13. 1 H. 8. c. 10. 7 R. 2. c. 14. 17 R. 2. c. 6. 31 H. 6. c. 4. 32 H. 8. c. 5. 5 Eliz. c. 1. §. 10. 27 H. 8. c. 26. §. 3. 4.

To these statutes may be added several publick acts. As,

The

The Commons pray, that, whereas for discussing of pleas and traverses in Chancery, the Justices of the King's Bench, and Common Pleas, were drawn into *Chancery*, out of their courts, that the King would ordain, that when any of the King's subjects came into *Chancery*, and offered to traverse any office there, or that any writ of *scire facias* should issue out of the said court, that the said writs and offices should be sent into the King's Bench, and Common Pleas, and there be discuss'd and determined according to law.—The King's answer is,

The *Chancellor* may do it by his office, and let it be as it hath been heretofore us'd by the discretion of the *Chancellor* for the time being. *Rot. Parl. 2 H. 4. N° 95.*

The Commons by their petition alledge, that all manner of writs then paid a fine to the King, and pray, that these fines be releas'd, except the fee of the seal, and for the labour of the clerks.-----The King's answer is,

That he will charge the *Chancellor*, that the fines be reasonable, according to the state of the person. N° 15, 5, 3. N° 29, 40.

The Commons pray, that whereas in the great charter it is contain'd *quod nulli negabimus, nulli vendemus, aut differemus justitiam vel rectum*; yet fines are taken in Chancery, for several writs, contrary to the statute, whereof they pray remedy. ----- The King's answer is, That

That he will do as he and his ancestors have before this time done, and he will charge *his Chancellor* that the fines be reasonable. *Rot. Parl.* 46 E. 3. N^o 38.

To another petition of the like kind, the King answers,

He will charge *his Chancellor* to be as gracious as may be *in the granting of writs*. Anno 45 E. 3. N^o 15.

Anno 13 R. 2. The Commons pray, that at the suit of the party or any suggestion, none of the King's subjects be made to come by writs *quibusdam certis de causis*, or any other such writs, before the *Chancellor*, or the King's Council, to answer in any manner where recovery is to be had by common law, except in writs of *scire facias*, grounded upon common law, or statute, on *pain of one hundred pounds to the Chancellor*.

The 5 R. 2. there is another petition of *Parliament*, that the *Chancellor* may examine and redress the state of the Chancery, and displace the officers that are found unfit, and place others in their room. *Rot. Parl.* 5 R. 2. N^o 20. Many other publick acts might be added, that speak of the Chancellor as the only Judge of law in this Court, which to avoid prolixity I omit.

Pleas in Chancery are *Coram Domino Rege in Cancellaria*, before the King in Chancery; which stile of proceedings in the Court, is a great proof that the *Chancellor*,
from

from whom the *Chancery* takes its name, is the *Judge*: But if this shou'd not be taken to be a conclusive argument, yet there are certain particular writs and proceedings in this court, which do necessarily fix and determine the Chancellor to be the *sole Judge*.

One modern as well as ancient branch of the jurisdiction of the court of Chancery is, the holding plea of personal actions by or against any officer or minister of the court.--- This privilege was invaded by the sheriffs of *London*, about the 18 *E. 3.* whereon the *clerks of the Chancery* petitioned the King, by whom an answer was given by assent of Parliament, which may be seen in the *Rolls of Parliament*; but being printed in the *Register of Original Writs*, 90 *b.* I shall take it from thence.

The clerks, by their petition, complain, that *whereas the Chancellors and Keepers of the Great Seal for the time being*, time out of mind, *have had*, and *by reason of their office ought to have*, conuſance of all manner of pleas of trespass done to the said clerks, or to others by the said clerks, in cities or elsewhere, where the Chancery should be, yet the sheriffs of *London*, to grieve *Gilbert de Chishall*, one of the clerks of the Chancery, and to out the King and *his Chancellor* of jurisdiction in this matter, made a precept on a bill of trespass before them, against the said *Gilbert*, and compelled him to appear before them;

at

at which time he alledged, he ought not to answer before them, but *before the Chancellor*, and produced the King's writ to supersede the plea; and that they ought to order the party plaintiff to sue to the *Chancellor* to have right for the trespass done him by the said clerk, if any were done: which writ they wou'd not allow in despite of the King, and against his command, thereby *outing the King and his Chancellor* from his jurisdiction, in contempt and prejudice of the King and his Crown; and therefore they pray that a remedy may be ordain'd thereon, so that the *place, i. e.* the court of Chancery, may be maintain'd in manner as hath been in times past.

To which the King's answer by assent of Parliament is,

Because *the Chancellors and Keepers of the Great Seal* of the King and his progenitors, have by ancient custom had the consueance of all trespasses done to the clerks in Chancery — Let a writ be awarded to the Mayor of *London*, to attach the sheriffs, by their bodies, to be before the King in his Chancery at a day certain, to answer as well for the contempt done to the King, and prejudice to *his Chancellor*, as to the clerk for damages.

Now who do the King, the Parliament, and the Clerks, affirm to be the Judge before whom all pleas of trespass, done by or to a clerk of Chancery, are to be determin'd; is it

not expressly said to be before the *Chancellor* or *Keeper* of the great seal; that they, time out of mind, by virtue of their office, ought to have the conuſance, and that the doing otherwise is a contempt to the *Chancellor* or *Keeper*, and an *outing* them of *their* jurisdiction. Is there here one word of the Master of the Rolls, or any jurisdiction in him as a *Judge*?

And according to this fundamental notion that the *Chancellor* or *Keeper* is the *Judge* of law in Chancery, are all the *writs* of *privilege*; which writs shew the *true* jurisdiction and state of the court.

There are three of these writs of privilege in the *Register original of writs*, 91. *a. b.* and 104. they all recite the privilege of the clerks in Chancery, not to be compelled to answer before any judges, except before the *Chancellor* or *Keeper* of the great seal: and whereas *A. B.* hath impleaded *C. D.* a clerk of the Chancery, before the Justices of the Common Pleas, therefore the writ commands the Justices to supersede the plea against the said *C. D.* and to tell *A. B.* on the part of the King, that he may prosecute the said *C. D.* before the *Chancellor*, if he thinks fit.

There is a like writ of privilege for a curſitor in *Coke's Entry*, 438. *a.* and presidents are plentiful enough in the books to this purpose. *v. Co. Entr.* 438, 678. *Cliff. Entr.* 569. *Raft.* 473.

There is another sort of proceeding in this court, which likewise fixes and determines the *Judge*, and that is the method of proceeding on petitions of right to the King.

A Petition to the King is in nature of an action against a subject, wherein the suppliant sets out his right to that which is demanded by him, and prays the King to do him right and justice; and upon a due and lawful trial of his right and title, to make him restitution.

This is call'd a *Petition of Right*, because the King is bound of right to answer it; and let the matter therein contain'd be determined in a legal way, in like manner as causes between subject and subject; and the court wherein this petition is determined, is in Chancery, and the method is this; the Petition is presented to the King, who subscribes it with these words, *soit droit fait al partie*, i. e. *let right be done to the party*; and thereupon it is delivered to the Chancellor in *forma juris exequend. to be executed according to law*: who thereon proceeds in the same legal manner on this Petition as in actions; the form of all which, and the manner of entering it on the file or Roll, may be seen in *Coke's Entries*, 419. d. 422. b. There is no mention of any other *Judge* but the *Chancellor*, and the *Chancellor* is always mention'd as the *Judge*.

Anothre

Another way to know who is the *Judge* of a *court*, is to see who *gives the judgment*; he that never gives judgment, can never be the Judge; and he who always gives the judgment, must be *the Judge*. Now I never met with any *single instance* in any case on the law-side of the Chancery, where the Master of the Rolls ever gave judgment, or where the Chancellor *did not give judgment*.

The form of a judgment for cancelling letters patents on a *scire facias*, is in the Prince's case, 8 Coke 30.---- *Ideo consideratum & adjudicatum est per dictum dom' cancellar' & per dictam cur' hic, &c.*---- It is therefore *adjudged* by the *Lord Chancellor*, and by the court, &c.

In the same book, p. 404. is a judgment upon a *monstrans de droit*, viz. *It is therefore consider'd and adjudg'd, by the well-beloved and faithful counsellor of the now Queen, Sir Christopher Hatton, Knt. Lord Chancellor of England, and by the court of Chancery, that, &c.*---- There are likewise two judgments upon Petitions of Right, *ibid.* 422. *a.* 423. *d.* the one in King *James* the first's time, the other in the time of *H. 7.* in both which the judgments are in the same manner, and were never in any time given in any other manner, or by *any other person* besides the *Lord Chancellor*.

From these instances it is evident, that the court of Chancery on the *law-side* is held *before the Chancellor*; and that he is the only Judge: unless it can be imagined that such a one can be a judge, before whom the court was *never* held, and *who never gave one judgment in it*.

After all these proofs and demonstrations that the Chancellor is the sole Judge on the law-side, in the court of Chancery, it may be esteem'd needless and tedious to produce the occasional testimonies of learned men; but since the *plainest* things may happen to be *question'd*, I hope I shall be excus'd in citing some few here, and some more in the next chapter.

The Mirror of Justice, a book of great antiquity and esteem in the law, saith, Our ancestors ordained *one Seal*, and *one Chancellor* for the keeping of it, to give remedial writs to all, *Mir. cap. 4. ordinance de judgment*.

Fleta, an antient lawyer, speaking of the Chancery, writes, *est inter cætera quoddam officium quod dicitur cancellaria, quod uno viro provido & discreto ut episcopo vel clerico magnæ dignitatis debet committi simul cum cura majoris sigilli*, *Fleta, lib. 2. c. 13. p. 75.*

In the year-book of 15 *H. 7. fo. 16.* in a *Scire Facias* to have lands again that were extended on a statute staple, by reason the debt was satisfy'd by effluxion of time, he who hath the land in Extent, may demand for his
special

special damages and costs: In which case, saith Justice *Fairfax*, the *Chancellor* who is *their Judge* may determine, if the damages and costs are reasonable or no: and the *Chancellor* by his *discretion* may adjudge the damages.

Mr. *Plowden*, in his commentaries, fo. 74. all original writs are awarded out of the Chancery by the Lord Chancellor, who is deputed by the King for that purpose.

Sir *Edward Coke*, in his 4 *Inst.* 80, 97, 95, 82. delivers it to us, that in the Chancery there are two courts, one ordinary, *coram dom' rege in cancellaria*, wherein the Lord Chancellor or Lord Keeper of the great seal proceeds according to the laws of the realm.----

That in this court the Lord Chancellor or Lord Keeper is the sole Judge; whereas in the King's Bench there are four at the least.----

That the court of Chancery is *sway'd or govern'd* by the Lord Chancellor or Lord Keeper of the Great Seal.---- That there be in this court many officers, ministers and clerks, the principal whereof is the *Master of the Rolls*.---

That the officers and ministers of this court of common law, do principally attend and do their service to the Great Seal, as the twelve Masters of the Chancery, whereof the Master of the Rolls is chief.

In the articles exhibited by the Archbishop of *Canterbury*, in the name of the whole Clergy, in *Mich. Term.* 3 *Jac.* 1. 2 *Inst.* 609. to the Lords of the Privy Council, intituled,

Certain articles of abuses, which are desir'd to be reform'd in granting prohibitions; one of the articles is,---- No prohibition upon surmise to be granted, either out of the King's Bench or Common Pleas, but out of Chancery only.---- On which they suggest, that the granting prohibitions by so many courts, is a chief cause that the ecclesiastical jurisdiction is oppress'd: whereas, say they, we are perswaded that *all such kinds of prohibitions* being *Original writs*, ought only to issue out of the Chancery, and neither out of the King's Bench, or Common Pleas. And that this hath been the antient practice in that behalf, appeareth by some statutes of the Realm, and sundry judgments at the common law: *for if prohibitions were to issue only out of one court, and from one man, of such integrity, judgment, and sincerity, as we are to imagine the Lord Chancellor of England to be endued with, it is not likely he would ever be induced to prejudice the ecclesiastical jurisdiction with so many needless prohibitions.*

It is plain, from hence, the Clergy thought there was but *one man*, viz. the *Chancellor*, who was *the Judge* of the court, and the Judges in their answer do not in the least question or deny it.

Sir Robert Cotton, in the MSS. cited by the author, says, that the *Chancellor has the absolute and ordinary power of the court*; that these *two distinct powers* or courts in the law, are

are acknowledg'd to be in the *breast of the Chancellor*.---- That law proceedings must be according to the *Chancellor's ordinary power*, and the *Chancellor* must judge therein according to law, and not according to conscience, for *quando dua jura concurrunt in una persona æquum est si esset in diversis*.

From all these considerations it most evidently appears, that the *Chancellor* is the *sole Judge*, on the law-side of the court of Chancery; the inference from which is plain and necessary, that if there be but one Judge only in that court, then there cannot be two; and if the *Chancellor* be that *only Judge*, then the *Master of the Rolls* cannot be *any Judge* at all: and from thence will likewise follow another conclusion, that if the *Master of the Rolls* hath done any judicial act, or any acts relating to judgment on the law-side of the court of Chancery, the same hath been done by him, unless where authorized by the King's commission, as a minister or officer of the court, and not as a Judge, which shall be more particularly made out in the sequel of this discourse, when I come to take a more particular notice of the office of the *Master of the Rolls*, and of the acts done by him in this court.

C H A P. II.

That the Lord Chancellor is the sole Judge of Equity, in the Court of Chancery.

THE court of Chancery, as it is a court of Equity, proceeding *secundum æquum & bonum*, and not according to the rules and order of law, is *recent*, and *modern*, in respect of the law-side, and is not, like that, immemorial or beyond time of memory.

Our ancient writers, as *Bracton*, *Briton*, *Flota*, mention nothing of this court of equity, neither indeed could they, because it was then not in being.

At what time soever the absolute and extraordinary power was adjoined to the ordinary power of the court of Chancery, it cannot be imagin'd, that it so far alter'd the court, as to change the Judge of the court, or to introduce a new one; but he who was Judge of the court, whilst it was a court of law, remain'd the Judge still, when it came to be a court of Equity.

The addition of matters of equity, and the annexing a new cognizance and jurisdiction to the court, did not destroy, or change the

the frame or constitution of the court; but he who was the *sole* Judge, whilst it was a court of law only, continued *so* still, when equity was added to it.

The reason and the nature of the thing prove this, and the subsequent facts shew it accordingly.

To make this plain and easy, I shall briefly, as far as the distance and obscurity of the matter will permit, enquire into the rise and progress of the course of equity, in the court of Chancery; when, and how it first came into the court, and to whom it was committed when it did come in.

The administration of justice in this Realm, was the ^a prerogative of the King, who was sworn at his coronation, to deliver to his subjects *equam & rectam justitiam*; this was impossible for him to do in person, therefore of necessity he delegated it by several portions, to ministers and officers deputed under him, whom he circumscrib'd within the limits of positive laws; whence by degrees standing courts of justice were form'd, who in the King's name, and by his authority, dispens'd justice to the people according to an establish'd law and order; but inasmuch as positive laws must in their nature consist of general institutions, there were, of necessity, variety of particular cases still hap-

^a v. *Bracton* 108. diversity of courts. 1. *Maddox* hist. Excheq. 61. *Spellm.* Gloss. verbo *Cancellarius*.

pening,

pening, wherein no proper or adequate remedy could be given, by the ordinary courts of justice, proceeding according to positive law; and many times the rigour of the law might in particular cases be oppression and injustice: therefore to supply the want, and correct the rigour of the positive established law, recourse was had to the King, the fountain of justice, to obtain relief in such cases, and in such manner, as should appear to him to be reasonable and just.

The ^b method of applications for relief in these cases, was by bills or petitions to the King, sometimes in Parliament, sometimes out of Parliament, commonly directed to him and his Council, and the granting them, was not esteemed a matter of right, *but of grace and favour.*

When a Parliament met there were usually Petitions of all sorts and kinds preferr'd to the King, and the distinguishing of these petitions, and giving proper answers to them, occasioned a weight and load of business, especially when Parliaments sat but a few days; and therefore to remedy it, an ^c ordinance was

made

^b Ry/. placit. Parl. 502. &c.

^c Pur ceo ke la gent ke venent al Parlement le Roy, sunt sovent deslaez & disturbez a grant greivance de eus e de la curt, par la multitude des petitions, ke sunt botez devant le Roy, de queus, le plus porreient estre espleytez par Chancellor, e par Justices, *Purveu* est ke tutes les petitions, *ke tuchent le sel* veynent primes al Chancellor, e eus ke tuchent, le Eschequer veynent al Eschequer, e eus ke tuchent Justices, v ley de terre veynent

made *Anno 8 E. 1.* which is in *Ryley's Placita Parliamentaria*, pag. 442. wherein it is recited, that the people who came to parliament, were often delay'd and disturb'd, to the great grievance of them, and of the court, by the multitude of petitions laid before the King, the greatest part whereof might be dispatch'd by the Chancellor, and by the Justices; therefore it is provided that all the petitions which concern the seal, shall come first to the Chancellor; and those which touch the Exchequer, to the Exchequer; and those which concern the Justices, and the law of the land, to the Justices; and those which concern the Jews, to the Justices for the Jews; and if the affairs are so great, or if they are of Grace, that the Chancellor, and others, cannot do it without the King, then they shall bring them with their own hands before the King, to know his pleasure; so that no petitions shall come before the King, and his Council, but by the hands of the said Chancellor, and other chief ministers; so that the King and his Council may, without the load of other business, attend the

veynent a Justices a ceus ke tuchent, jeury veynent a Justices de la juerie. Et si le besoignes seent *si granz* v *si de grace* ke le Chancellor e ces autres ne le pussent, faire sans le Roy, dunk il les porterunt par leur meins demeipe devant le rey, pur faver ent, sa volente. Ensi qe nul petition ne veigne devant le Roy e son conseil, fors par le mains des avantditz Chancellor, & les auter Chief Ministres. Ensi qe le Rey e sun conseil pussent sans charge de autre busoingnes, entendre a grosses busoinges de sun reame e de ses forreines terres. Claus *Anno 8 E. 1. m. 6.* dorso m cæd. Ryl. pla. Parl. 442.

great

great business of his Realm, and of other foreign countries. And a subsequent regulation was made, about sorting these petitions into several bundles, *Anno 21 E. 1.* as may be seen in the same ^d book.

But that which I cite this for, is to shew, that in the time of *E. 1.* matters of grace were only determinable by the King, or by such as he appointed, and not in any form'd or establish'd court of Equity; and therefore the statute *Anno 28.* of the same King, which enacts, that the Chancellor, and Justices of the King's Bench, shall follow the King, so that he may have always near him, wise men in the law, able duly to order all such matters, as shall come unto the court, at all times when need shall require, doth not, as Sir ^e *Edward Coke* truly observes, suppose that the Chancellor at that time held a court of Equity, or that he attended on the King, to decide matters in Equity.

I do not find any traces of a court of Equity in Chancery in the time of *Edward* the second.

It seems to me that the Equity side of the court of Chancery began in the time of King *Edward* the third.

Doctor ^f *Brady* writes that the Chancellor had no causes pleaded before him till the time of *Edward* the third, and that there are no

^d Ry/. Placit Parl. 439.

^e 2 Inst. 552.

^f Hist. of Engl. 153. 1 Lev. 241.

decrees to be found in Chancery before the
20 H. 6.

Mr. ^s *Lambard* thinks, that when the courts of Chancery, and King's Bench, ceas'd to be ambulatory, and became settled courts in a certain place (which was the 4 of E. 3.) that then the King committed to his Chancellor, together with the charge of the Great seal, his only legal, absolute, and extraordinary pre-eminence of jurisdiction, in civil causes, as well for amendment, as for supply of the common law, tho' he saith, he doth not ^h remember that in our Reports of common law, there is any frequent mention of causes usually drawn before the Chancellor for help in Equity; but only from the time of King H. the 4. in whose days, by reason of those intestine troubles, feoffments to uses did either first begin, or else, did first grow common, and familiar; for remedy, in which cases of uses, the Chancery Court was then fled unto, as the only altar of help and refuge.

It will be needless to tire the reader with any other authorities or opinions of learned men on this head, seeing it is unquestionably certain from the rolls of Parliament, in the time of *Richard* the second, and other public Acts, that the Chancellor had then jurisdiction in matters of Equity, and it could not then have been carry'd to such height,

^s *Archæon*, 62, 63.

^h *ibid.* 67, 68. *Dudg.* 37.

as to occasion complaints in Parliament, if it had not had some beginnings or continuance before.

I will not say that the Chancellor's jurisdiction of Equity was not before the 22 *Ed.* 3. there are some intimations in books as if it was earlier in that reign, but the most probable time I can fix upon, for any thing that looks like an establishment, is the 22 *E.* 3. and most probably the Chancellor's jurisdiction in Equity, took its publick authoritative commencement from the Writ or Proclamation, which I have transcribed from the original words on the Roll, and is in *English* thus.

" The ⁱ King to the sheriffs of *London*
 " greeting. Forasmuch as we are greatly and
 " daily busied in various affairs concerning
 " us and the state of our realm of *England*:
 " We will, That whatsoever business, rela-
 " ting as well to the *common law* of our
 " kingdom, as our *special grace* cognizable
 " before us, from henceforth be prosecuted
 " as followeth, viz. The *common law* busi-
 " ness, before the Archbishop of *Canterbury*
 " elect, our *Chancellor*, by him to be dis-
 " patch'd; and the other matters grantable
 " by

" ⁱ Rex vicecomit' *London* salutem. Quia circa diversa
 " negotia nos & statum regni nostri *Angl.* concernentia su-
 " mus indies multipliciter occupati, volumus quod quælibet ne-
 " gotia tam communem legem regni nostri *Angl.* quam gratiam
 " nostram specialem concernentia penes nosmetipsos habens ex-
 " nunc prosequend' eadem negotia, videlicet. negoti aad communem
 " legem penes venerab' virum elect' *Cantuar'* confirmat' *Can-*

“ by our *special grace*, be prosecuted before our
 “ said *Chancellor*, or our *well beloved Clerk*,
 “ the *keeper of the Privy seal*, so that they,
 “ or *one of them*, transmit to us such peti-
 “ tions of business, which without consult-
 “ ing us they cannot determine, together
 “ with their advice thereupon, without any
 “ further prosecution to be had before us for the
 “ same; that upon inspection thereof, we may
 “ further signify to the aforesaid Chancellor or
 “ Keeper, our will and pleasure therein;
 “ and that none other do for the future
 “ pursue such kind of business before us, *we*
 “ *command you immediately, upon sight hereof,*
 “ *to make proclamation of the premises, &c.*

This referring matters of *Grace* to the
 Chancellor, seems to have laid the *foundati-*
on of Equity in the court of Chancery, as
 the reference to the Keeper of the Privy
 seal, did probably lay the foundation of that
 Court, which was afterwards called the

“ cellarium nostrum per ipsum expediend. Et alia negotia de
“ gratia nostra concedenda penes eundem cancellarium seu
“ dilectum clericum nostrum Custodem sigilli nostri privati
“ prosequantur. Ita quod ipsi vel unus eorum petitiones, nego-
“ tiorum quæ per eos nobis inconsultis expediri non pote-
“ runt, una cum advisamentis suis inde ad nos transmittant
“ vel transmittat, absque alia prosecutione penes nos inde
“ faciend’ ut his inspectis ulterius præfato Cancellario, seu
“ Custodi inde significemus velle nostrum, & quod nullus
“ alius hujusmodi negotia penes nosmetipsos de cætero prosequan-
“ tur, vobis præcipimus quod statim visis præsentibus præmissa
“ omnia & singula in civitate prædicta in locis ubi expediri
“ videritis publice proclamari, faciatis in forma prædicta, &
“ hoc nullatenus omittatis. Teste Rege apud Langley 13. die
“ Januarij, Anno regni sui 22 E. 3. Claus. p. 2. m. 2. in
“ dorso per ipsum Regem.”

Court of Requests ; but my present business relating only to the Chancery, I shall confine my self to that, and observe that in this writ or original appointment, the prosecution *of matters of grace is not given before any other officer or minister of the Chancery, but before the Chancellor only.*

That the Chancellor did from this time, or in the time of *E. 3.* exercise a jurisdiction in matters of equity, seems evident from *Rot. Parl. 45. N^o. 24.* which is printed in *Rolls first Abr. 372.* and from that in the beginning of the next reign, *viz. R. 2.* complaints are made in Parliament, of the exercise of his power, to the subversion of the ^k common law.

“ The 7 *R. 2.* the Commons pray, that at
 “ the suit of the party, or any suggestions,
 “ none of the King’s subjects be made to come
 “ by Writs, *quibusdam certis de causis*, or any
 “ other such Writs *before the Chancellor*, or
 “ the King’s counsel, to answer in any
 “ manner where recovery is to be had by
 “ common law, except in Writs of *Scire Facias*
 “ grounded on common law or statute,
 “ *on pain of one hundred pounds to the Chan-*
 “ *cellor.*

“ The 13 *R. 2.* The Commons pray, that
 “ neither the *Chancellor*, nor the King’s
 “ counsel, after the Parliament ended, make
 “ any ordinance against the common law,

^k Rot. Parl. Anno 2 *R. 2.* 7 *R. 2.* 13 *R. 2.*

“ or

* or antient customs of the land, or statutes
 “ made formerly or in this present Parlia-
 “ ment, but that the common law run to all
 “ the people universally.

I do not find that the Commons got any thing by their Petitions; besides, an Act of Parliament 13 R. 2. c. 6. which reciting that people were compell'd to come before the King's Council, or in the Chancery, by Writs grounded upon untrue suggestions, enacts,
 “ *That the Chancellor for the time being, pre-*
 “ *sently after such suggestions be duly found,*
 “ *and proved untrue, shall have power to*
 “ *award and ordain damages according to his*
 “ *discretion, to him which is so unduly trou-*
 “ *bled as aforesaid.*

These instances and efforts against the growing power of courts of Equity, and especially of Chancery, were renew'd by the Commons in the ¹ reigns of H. 4. H. 5. and H. 6, as by the Parliament Rolls may be seen; but however, this might check the growth of it for a time, yet at length it got the better of all opposition, and I do not find any instances against it by the Commons, after the first of H. 6. but on the contrary, what was done by the Parliament in the first year of his reign, confirm'd and establish'd that power; for Henry the 6th being then a child, Thomas Bishop of Durham was made Chan-

¹ 2 H. 4. rot. Parl. N^o. 97. 4 H. 4. N^o. 78. 3 H. 5. N^o. 46. 1 H. 6. N^o. 41. v. Rolls abr. 370. printed there.

cellor, by the advice and assent of Parliament, and thereon a Patent was made to him of the office of Chancellor, whereby the King, by the advice and assent of Parliament, ^m grants to him all, and all manner of authority and power, to do and execute *vice, nomine & loco nostris*, in the King's stead, name and place, all and every thing and things which by law or custom belong to the office of Chancellor of England, or at any time have accustomed to belong thereunto, with a command to all his subjects to obey and assist the Chancellor in all things in the exercise of his said office.

From this time the jurisdiction of Equity went on smoothly in the court of Chancery, and, as Sir *Edward Coke* observes ⁿ, increas'd while *John Kemp*, Bishop of *York*, and Cardinal, was Lord Chancellor, in the 28 of *H. 6.* but increas'd most of all under Cardinal *Wolsey*, who was made Lord Chancellor 8 *H. 8.* and continued so till 21 *H. 8.*

In the authorities before cited, to make out this brief account of the original of this court of Equity, the reader may easily see that the Chancellor *is the only person suppos'd to be the Judge of the court*, and in those days, and afterwards, it was the receiv'd opinion, that the judging in matters of equity was personal to the Chancellor, and that he alone,

^m Rym. Fœd. 10 Tom. p. 259.

ⁿ 2 Inst. 553.

in these matters, acted as in the aforesaid patent of 1 *H. 6. vice, nomine & loco* of the King: and this will particularly appear from hence, that tho' the Keeper of the Great Seal had in himself the Chancellor's judicial power in law, by being Keeper of the Great Seal, yet till the Act of Parliament of 5 *Eliz. c. 18.* he was not generally taken to have the *judicial power of equity without a particular grant from the Crown for that purpose*: and if the Keeper of the Great Seal had not jurisdiction in Equity, *virtute officij*, but only by particular Grant or *Commission*, much less can the Master of the Rolls, or any other officer, have it *otherwise*.

Before the jurisdiction of Equity was fully establish'd in this court, when the Great Seal was deliver'd to the custody of another in the absence or vacancy of the Chancellor, it was, according to my observation, only to seal, and to do other matters relating thereto, as the ° 12 *H. 4.* when the Chancellor *being variously employ'd, that for a certain time he could not attend sealing*, the Great Seal was deliver'd to the custody of *John Wakering*, Keeper of the Rolls, to *seal and do other matters relating to that office or duty*.— But after the first of *H. 6.* when this Equity court came in effect to have the sanction of Parliament, as is before related, we find in

such cases another form of delivering the custody of the Great Seal.

In the 11th of this reign of *H. 6.* the Bishop of *Bath*, Chancellor, being to go to *Calais* about the King's affairs, the Great Seal, during his absence, was delivered by him to *John Frank*, Clerk, Keeper of the Rolls, by virtue of a *P Writ* directed to the Master of the Rolls, wherein the King recites, that the Chancellor was to go to *Calais* about the publick business; *but we willing that justice, and execution of the laws, customs, or statutes, of our kingdom of England, should not be thereby retarded, but rather in the mean time full justice should be done to every one willing to sue in our Chancery, have willed and commanded our Chancellor to deliver our Great Seal, for the time of such his absence, into your hands, to be kept till his return, to the end that you in his absence may occupy that Seal, and may do and execute the matters of justice, and the course of our Chancery, as is fitting; and therefore we command you, that you receive our Seal from the Chancellor, and in the mean time occupy it to that use, and to do other the premises in the form aforesaid, and to re-deliver the said Seal to our Chancellor upon his return.*

P Bears Teste, 15 April, anno 11 H. 6. The bishop was absent about five weeks, viz. to the 23 of May following, and then the Keeper of the Rolls re-deliver'd the Seal to the said Lord Chancellor, Claus. anno 11 H. 6. m. 12. dorso. Rym. Fœd. 10. Tom. 549.

Anno

Anno ⁹ 3 *E.* 4. 1463. the Bishop of Exeter, Chancellor, being to go beyond sea about publick affairs, the Great Seal, during his absence, was committed to Robert Kirkham, Keeper of the Rolls, with the same special authorities and powers, and almost in the same words, *mutatis mutandis*, as the Great Seal in the preceding reign was deliver'd to John Frank.

The Great Seal was taken from the Archbishop of York, Chancellor, the 8th of June 7 *E.* 4: and the next day was deliver'd to Robert Kirkham, Keeper of the Rolls, to seal: And over the King will'd ther and thanne, that all manere matters to be examined and discuss'd in his court of Chancery, should be directed and determined according to equity and conscience, and to the old cours and laudable custome of the same court: so that if in any such matters any difficulty or question in the law happen to arise, that he therein take the advice and counsel of some of the King's Justices, so that right and justice may be duly administer'd to every man.

Upon the surrender of the office of Chancellor, by Sir Thomas More, 20 May, 24 *H.* 8. the King committed the custody of the Seal to Thomas Audley¹, and declared and commanded him to be call'd Lord Keeper of the King's Great Seal, and to do and execute all

⁹ Rym. Tom. 11. 506. & p. 515. a commission of the like kind to the same Robert Kirkham.

¹ Rym. *ibid.* 578.

¹ Rym. 14 Tom. 434, 435.

and every thing in the court of Chancery, Star-chamber, and Council, as the Chancellor of England was wont to do and execute.

The 26 Jan. afterwards, the King receiv'd the Great Seal from the said *Thomas Audley*, and then made him his Chancellor of *England*, and deliver'd back again to him the Great Seal; * but then there is no such particular power given to him as when he was made Keeper.

The said *Thomas Lord Audley*, Lord Chancellor, being sick and languishing, the King did not take from him the Chancellorship, but received from him the Great Seal, and 22 of April, 36 H. 8. committed it to *Thomas Lord Wriothesley*, † to keep and exercise during the infirmity of the said Lord Chancellor, with authority of doing and exercising all and singular matters which the Lord Chancellor of England by virtue of his office might do, and execute. But *Audley* soon after dying, *Wriothesley* was made Chancellor the third of May following, when there is only a general constitution of him as Chancellor, and a delivery of the Seal to him as such.

The said *Thomas Lord Wriothesley* ceased to be Chancellor the 6th of March, 1 E. 6. and † *William Poulet*, Lord St. John, was made Lord Keeper the 7th of March, 1 E. 6. and so continued to the 23d of October following; but he had a special authority gran-

* Rym. Tom. 14. fo. 446.

† Rym. 15 Tom. fo. 20.

‡ Pat. de Anno 1 E. 6. p. 4. m. 24. dorso.

ted to him, to hear, examine and determine causes, matters, and suits, in Chancery, like as the Chancellor of England for the time being theretofore, had us'd, done, and practis'd.

Rich, Goodrick, Gardiner, and Heath, who successively came after St. John, were all Chancellors.

Sir *Nicholas Bacon*, who succeeded *Heath*, was made Keeper of the Great Seal 22 December, 1 *Eliz.* and by the following Patent tested the 14 April, 1 *Eliz.* it seems, that at the taking of the Seal, he had omitted to take any special Grant from the Queen to hear causes in the Chancery; the Grant itself will shew what it was taken for; and therefore I have transcribed it from the Roll, and is as follows,

“ *Elizabeth*, by the grace of God, &c.
 “ To all and singular our subjects greeting.
 “ Where we of our special grace have de-
 “ puted and assign'd our trusty and well-
 “ beloved Counsellor, *Nicholas Bacon*, Knt.
 “ to be Keeper of our Great Seal. Know that
 “ we, by these presents, do give full power
 “ and authority to the same *Nicholas Bacon*,
 “ as well to hear, examine, and determine, all
 “ causes, offences, contempts, and matters,
 “ of whatsoever kind or nature they be of,
 “ as to do and use himself in every thing and
 “ things with our said Seal, in as large and
 “ ample manner as our Chancellor of England
 “ might do. And that he shall have the same

" power and authority in every behalf touch-
 " ing the premises, *as if he were our Chan-*
 " *cellor.----- And further, we grant, for us,*
 " our heirs and successors, that *all acts and*
 " *things done, or suffer'd to be done, by the*
 " *said Nicholas, at any time since the commit-*
 " *ting of the custody of the said Seal to his*
 " *hands, shall be as good and effectual, to all*
 " *intents and purposes, as if he had been Chan-*
 " *cellor at the time of doing or suffering of*
 " *any such act or thing; or that he, his heirs,*
 " *or executors, shall in no wise be impeach-*
 " *able or answerable for any such act or*
 " *thing; and that these our Letters Patents*
 " *shall be to him sufficient warrant for the*
 " *same.----- In "* witness whereof, &c. Wit-
 " *ness the Queen at Westminster, the xiiij day*
 " *of April.* *Per ipsam reginam.*

This Grant shews, this grave and prudent
 Lord Keeper did not imagine that he had
 power, by virtue of that office, to determine
 all causes in Chancery as the Chancellor,
 without a particular Grant from the Crown
 to that purpose: and having determined some
 without such authority, he did not argue they
 must be good, *because the properties of his*
fellow subjects depended on such decrees, or that
the practicers of the law had apply'd to him for
such decrees, or because certain political incon-
 veniencies would follow; but he applied himself
 to legal and proper remedies; he first procured
 the Queen's authority to make them good, and

afterwards the statute of the 5th of the Queen, c. 18. was made, to declare the common law so to be, that the Keeper of the Great Seal of *England* of right hath the same jurisdiction, execution of laws, and all other customs, as of right belongeth to the office of Lord Chancellor of *England* for the time being: upon which Sir ^w Henry Spelman writes, *That for the benefit of that most wise Counsellor Sir Nicholas Bacon*, it was declar'd by this law that the authority of the Keeper of the Great Seal and of the Chancellor was the same.

It appears by the preamble of this law, that before the making of it some doubt was risen, whether the like jurisdiction and power did belong to the office of Lord Keeper, as to the office of Lord Chancellor; and if the law in this particular had not before this time been taken to be doubtful, the said Act of Parliament, as well as the said Grant or Pardon of the Queen's to Sir *Nicholas Bacon*, wou'd both of them have been useless, and to no purpose: and it is observable, that this Act of 5 *Eliz. c. 18.* which declared the common law to be, that the Keeper of the Great Seal had the same jurisdiction as the Chancellor, was not apprehended to extend to Commissioners for the custody of the Great Seal. It is well known, that after the making of the said Act, the custody of the Great Seal was several times in commission, but ex-

^w Spelm. Gloss. verbo Cancellarius.

cepting what was done in the time of the civil wars under ordinances and acts of those times, such Commissioners never exercis'd any act of judicature that I can find, till the Revolution, when the Act of Parliament was made, 1 *W. & M. c. 21.* intituled, *An Act for enabling Lords Commissioners for the custody of the Great Seal, to execute the office of Lord Chancellor, or Lord Keeper of the Great Seal.* Which recites, that the King and Queen had thought fit that the office of the Lord Chancellor or Lord Keeper of the Great Seal of *England*, should be executed by Commissioners appointed for the same, under the Great Seal of *England*; and that several authorities, jurisdictions and powers, were by several Acts of Parliament, and otherwise, vested and placed in the Lord Chancellor or Lord Keeper for the time being; and therefore, *for preventing of all doubts and questions that might arise, whether all or any of these authorities, jurisdictions and powers, might be exercis'd by such Commissioners*; it is enacted, by the said Act, that such Commissioners might use and exercise, at all times, according to their commissions, as of right belonging to the Lords Commissioners of the Great Seal of *England*, the like offices, authorities, jurisdiction, execution of laws, and all other customs, privileges, emoluments and advantages, which the Lord Chancellor or Lord Keeper for the time being, of right ought to use, have,

have, or exercise, as belonging to their or either of their said offices, or otherwise howsoever, to all intents and purposes, as if the said Lords Commissioners for the time being were Lord Chancellor or Lord Keeper of the Great Seal of *England*.

If the Commissioners had had all the power of the Chancellor by virtue of their commission or office, what need had there been of this Act of Parliament? but this Act, and that of the 5 of *Eliz. c. 18.* and those several *special Grants* made before the said 5 *Eliz.* to the Keepers of the Great Seal, to exercise the same jurisdiction as the Chancellors, do plainly shew, that heretofore the law was not generally taken to be, that the authority of the Chancellor and the Keeper was the same; and as to the point of judicature, it was generally apprehended to be personal to the Chancellor, and not of right to belong to the Lord Keeper, by virtue of his office.

And if the Keeper was excluded without a special *grant* or *commission* from the Crown, *a multo fortiori* must the Master of the Rolls or any other officer have been so too.

Another reason to prove the Chancellor to be sole Judge in Equity, is, that all Bills for relief in Equity are directed and address'd to him; the request and application is to him only, to grant such relief as to him shall seem most meet--- The address or direction of the bill is-----To the right honourable-----Lord
high

high Chancellor of *Great Britain*.----- The beginning of the bill is ---- *humbly complaining, sheweth unto your Lordship, your orator.* ----- The whole complaint, in the progress of the bill, is to *him only*; the relief is pray'd of him, and to the end the complainant may have the relief sought for. The conclusion of the bill is, *may it please your Lordship to grant unto your orator, his Majesty's most gracious writ of Subpœna, to be directed to the defendant, thereby commanding him at a certain day, and under a certain pain thereby to be limited, personally to be and appear before your Lordship.*

No man can be both judge and suitor, and therefore if the Chancellor be a suitor, he must direct his bill *to the King's most excellent Majesty in his high court of Chancery*: but all other persons must direct their bills to the Chancellor, not excepting the Master of the Rolls himself: of which, to mention but one instance----- In the bundle of Chancery parchments in the Tower---there is a bill by *Moreton*, Keeper of the Rolls, directed to the right reverend father in God, *Robert*, Bishop of *Bath and Wells*, which begins--- *humbly beseecheth your good Lordship, your servant and orator John Moreton, clerk, Keeper of the Rolls of the Chancery of our sovereign Lord the King*; and concludes with the prayer of a Subpœna to compel

pel the party to appear before his Lordship in the King's Chancery.

In the vacancy of a Chancellor, because there is then no one to act *vice, nomine & loco* of the King, all the bills are directed to the King's most excellent Majesty in his high court of Chancery, and relief is pray'd from him; but there is no such thing as directing bills to the Master of the Rolls, or praying process and relief of him.

The author of the discourse, p. 63. doth indeed affirm, that bills in Chancery have anciently been directed to the Master of the Rolls, praying process and relief; but this will appear to be a very great mistake, and shall be shewn so to be in the fifth chapter of this discourse; for which place, that I might now lay my thoughts before the reader entire, I have reserved the consideration of this and other affirmations of the author.

Another proof that the Chancellor is the sole Judge on the Equity side of the court of Chancery, is, that as all bills are directed to him, so all judgments are given by him, except in the vacancy of a Chancellor, or when he is a party in the suit.

This is a matter of fact, and cannot be deny'd; it is not a judgment or decree of the Court till it be enroll'd; and it is well known, that in the enrollment it always is, *that it is ordered, adjudg'd, and decreed, by the Lord Chancellor*, even all causes heard at the Rolls,
or

or by the Master of the Rolls; are so enroll'd, *that it is ordered, adjudg'd, and decreed, by the Lord Chancellor.*

This is acknowledg'd by the author, in p. 122. who there owns, that tho' the decree is made by the Master of the Rolls, yet the Enrollment concludes, it is ordered, adjudg'd, and decreed, by the Lord Chancellor, and by the high and honourable court of Chancery, that, &c. But there indeed he endeavours to prove, that this clause doth not shew the authority of every such decree to come from the Chancellor; and alledges several reasons for the same, in p. 123, 124, 125, 126. the validity whereof shall be hereafter particularly consider'd, and will, without any great difficulty, be determined by the reader; in the mean time, it is sufficient for the present purpose, that it is an uncontested fact, allow'd by him, that all the decrees in Equity, except made in a vacancy, or where the Chancellor is party, are enter'd upon the Roll to be *order'd, adjudg'd, and decreed, by the Lord Chancellor*; so that as all bills in the time of vacancy are directed to the Chancellor, in like manner, all judgments, except in time of vacancy, or where the Chancellor is a party to the suit, are given by the Chancellor only: there is not any instance of any final absolute judgment given to the contrary, or in any other manner. And therefore I think it is a self-evident conclusion, that
when

when there is a Chancellor, he is the sole Judge of Equity in the Court of Chancery.

Another proof that the Chancellor or Keeper is the sole Judge in Equity, is, that whensoever a Chancellor or Keeper dies, the whole business of the Court stops, till a new Chancellor or Keeper be made, or which is *tantamount*, till a commission be granted for the exercise of the power of the Chancellor or Keeper.

The Chancellor is in the Chancery *vice, nomine & loco*, in the *stead*, name and place of the King, to dispense his Justice and Grace; when there is a vacancy of the dispenser of his Justice and Grace, it then returns to his immediate direction, which is the reason that in all such vacancies the bills are immediately directed *To the King's most excellent Majesty, in his high court of Chancery*. But the exercise of the judicial power ceaseth till the King either makes a new Chancellor or Keeper, or vests the like authority in Commissioners, from whom, by supposition of law, the inferior officers, who assist in the exercise of the judicial power, may have the same authority of acting, as from a Chancellor or Keeper, when in being.

This, I think, hath been the constant experience, that after the death or removal of a Chancellor, there have been no judicial acts done

done in the Court till a new Chancellor hath been made, or a special Commission been granted. This was the case on Lord *Somer's* parting with the Seal. He, as the Author saith, p. 85. parted with the Seal 27 April, 12 Gul. and the Seal was not delivered to Sir *Nathan Wright* till the 21 May following; and in the mean time, viz. the 4th of May, two Commissions pass'd the Seal, one for the custody and using of the Seal, and the other to Sir *John Trevor*, the then Master of the Rolls, Judges and Masters to hear and determine causes; but till such Commission was past, Sir *John Trevor* did not do one judicial act as Master of the Rolls.

If the Master of the Rolls was a Judge of the Court by the right of his office, what need was there of any Commission at all? Might not the Master of the Rolls have continued to act for a few days without Commission? But this shews that the Author's suppos'd inherent right of this office was not then consider'd.

The 9 *Annæ*, 25 September, Anno 1710, Lord *Cowper* surrender'd the Seal, and the next day the Great Seal was deliver'd, for custody and use, to Sir *Thomas Trevor*, Chief Justice of the Common Pleas, Justice *Tracy*, and *John Scroop*, Esq; where it remain'd till the 19 October, 1710. when it was deliver'd to Sir *Simon Harcourt*, as Lord Keeper; in the

the mean time, *viz.* the 6th of *October*, a commission issued to the Master of the Rolls, Judges and Masters in Chancery, to hear and determine causes, under which the Master of the Rolls acted; but it doth not appear that the Master of the Rolls sat after the said 25 *September*, until after the said 6 *October*.

On the 15 *April*, *anno* 1718. Lord *Cowper* surrender'd the Seals a second time, the 18 *April* the Seals were deliver'd for custody and use, to three Judges; the 21 *April* a commission pass'd to Sir *Joseph Jekyl*, the Master of the Rolls, Judges and Masters, to hear and determine causes in Chancery; and it don't appear by the books that there was any sitting by the Master of the Rolls after the 15 *April*, till after the 21 *April*.

This modern practice is founded upon ancient presidents: there are two Masters of the Rolls of great reputation, who acted in the same manner, *viz.* Sir *Nicholas Hare*, and Sir *Gilbert Gerrard*: when *Stephen Gardiner*, Bishop of *Winchester*, Lord Chancellor, died, the Great Seal was taken into the Queen's hands and custody, who kept it till a new Chancellor was made; only 14 *Nov.* 2 & 3 *Ph. & Ma.* *anno* 1555. authority was given under the Great Seal to Sir *Nicholas Hare*, the Master of the Rolls, that whenever the Queen shou'd deliver to him the Great Seal, he shou'd seal all such patents, writs, &c. accustomedly seal'd with the Great Seal, in such

manner as the Chancellor of *England* for the time being might do, by virtue of his office. But the day before, viz. the ^x 13 *November*, the Queen assign'd Sir *Nicholas Hare* Master of the Rolls, to bear and determine all matters, suits and debates, in *Chancery*, and to execute all manner of causes and matters of justice, in the said court, after the course of the *Chancery*, in like manner as the Chancellor of *England* might do. And the Queen afterwards determining this commission, a like commission was granted to the same Master of the Rolls, and two Masters, or any two of them, whereof the Master of the Rolls to be one; which continued till Dr. *Heath*, the Archbishop of *York*, was made Lord Chancellor.

As to Sir *Gilbert Gerrard*, Sir *Christopher Hatton*, Lord Chancellor, died *Saturday* 20 *November*, 1591. and *Monday* 22 *November* the Queen seal'd a commission to the Lord Treasurer and other Lords, to seal all writs, processes, grants, &c. us'd to be seal'd with the Great Seal; and the same day another commission was seal'd, directed to Sir *Gilbert Gerrard*, Master of the Rolls, and others, for hearing and determining causes in *Chancery*, under which commission he acted until the 28 *May* following, when Sir *John Pickering* was made Lord Keeper.

^x Rym. Vol. 15. p. 426.

All this shews, that by the death or removal of the Chancellor, the exercise of all judicial power in the court ceaseth, till there be a new Keeper or Chancellor, or the Crown provides for it in a special and extraordinary way: and this ceasing of the exercise of all judicial power in this manner, shews, that the Chancellor is the only Judge. If the Master of the Rolls was a Judge, he wou'd, notwithstanding the death or removal of the Chancellor, continue the exercise of his judicial power, and not stay till a new Chancellor be made, or he receive power from the Crown by special commission. There was no reason for the Crown to grant, or for Sir *Nicholas Hare* to accept of a commission solely to himself, to hear causes in Chancery, if he cou'd have done it by his own authority *without any such commission.*

In the sequel of this discourse there will be occasion on another account to mention a great number of commissions, that within these two hundred years last past have from time to time been granted by the Crown to hear causes in Chancery, during the absence of the Chancellor, when there was a Chancellor in being; *all these* will be so many proofs that the Chancellor is the *sole* Judge of equity in this court, the tenor of them being to authorize the Commissioners *in the absence of the Chancellor*, to hear, examine and determine, causes and matters in Chancery,

cery, and that all and singular their judgments, orders and decrees, shall be *tanti & consimilis valoris efficaciae roboris & virtutis*; ac si per præd^m dominum Cancellarium ac curiam Cancellariae nostrae prædictae reddi^t sive reddend^u forent, i. e. of as much, and the like value, efficacy, strength and virtue,, as if they were given by the Lord Chancellor and the court of Chancery. There is no mention in these commissions of any other Judge in equity but the Chancellor or Keeper; the assistance given by these commissions, is to him, and the Commissioners decrees are to be of equal force with his: no other Judge in equity can be suppos'd by any one who attentively reads these commissions.

To these reasons may be added, the opinions of lawyers and learned men, whose constant language is, that the Chancellor is the sole Judge on the equity side of the court of Chancery.

Sir Edward Coke writes, that the Lord Chancellor or Lord Keeper is *sole Judge* both in *this* court of equity, and in the *court* concerning the *common law*; but in cases of weight and difficulty he doth *assist himself* with some of the *Judges* of the realm: and no greater exception can be taken hereunto, than in case of the Lord Steward of *England* being *sole Judge* in tryal of the Nobility, who also is *assisted* with some of the Judges.

4 Inst. 84.

The

The Chancery takes its name from the Chancellor--- In process of time much honour and authority was added to the office of Chancellor, by several Acts of Parliament, especially since all that rigour and strictness crept into the common law; and the pleading by niceties to a word became so ensnaring, that a court of Equity was found necessary: and this was committed to the Chancellor to judge according to the rules of equity, and to moderate the rigour of justice, which oft-times is oppression. There preside in this court, the Lord Chancellor of England, and twelve Masters of Chancery, as assessors, the chief whereof is the Keeper of the Rolls belonging to that court, and thence call'd magister Rotulorum, or Master of the Rolls.--- Camden's Britan' discourse on the law courts of England, ult. Edit. p. 255, 266.

Mr. Lambard, in his Archaion, speaks of no other Judge in equity but the Chancellor, and calls the court his court of Equity, p. 58. His court is said to be always open, and to have no record, because his judgments be in his own breast, not tyed to any preceding records; neither doth he try any issue, because he may examine both parties and witnesses upon oath, p. 64.

In the year-book 27 H. 8. p. 15. in a Chancery cause on the equity side, it is there delivered to us, that in this court there is but one Judge, viz. the Chancellor.

Sir *Henry Spelman* writing of the Chancellor, saith, that it may seem grievous that in the court of *one man's breast* the fortunes of all men shou'd be determined, that this was according to the custom of other nations; but both there and here it is a laudable custom in difficult cases, to have the assistance of Judges of other tribunals^y.

The treatise on the Chancery ascrib'd to the great and learned Lord *Elsmere*, cited by the author of the Discourse, saith^z, the Judge in this court is the Lord Chancellor *only*.

Sir *John Davis*, a lawyer of great abilities, in the preface to his Reports address'd to the said Lord *Elsmere*, writes, that the Great Seal is the seal of the kingdom; that the Lord Chancellor is the *sole* Judge in the high court of Chancery, where he hath *potestatem absolutam*, as well as *delegatam*, and decides causes by the rules of *his own* conscience.

But there is yet a greater opinion, and that is of the whole House of Commons: the accusation or impeachment of the Lord Viscount St. *Albans*, Chancellor of *England*, by the House of Commons, was delivered to the Lords at a conference on the 19 *March*, 1620. and the day after the Lord Treasurer reported the conference to the Lords; at which conference, saith his Lordship, was delivered the desire of the Com-

^y Spelm. Gloss. verbo Cancellarius.

^z Eg. Can. 31.

mons, to inform their Lordships of the great abuses of the courts of justice: the information was divided into three parts, 1. Of the persons accus'd. 2. Of the matters objected against them. 3. Their proof. The persons are the Lord Chancellor of *England*, and the now Lord Bishop of *Landaff* (being then no Bishop, but Dr. *Field*): the incomparable good parts of the Lord Chancellor were highly commended; his place he holds magnify'd, from whence *bounty, justice and mercy*, were to be distributed, *with which he was solely intrusted*, whither all great causes were drawn, and from whence no appeal lay for any injustice done, save to the Parliament.---
Journal of the House of Lords, March 20.
 1620.

The King then upon the Throne knew of no other Judge but the Chancellor; in a learned speech in the Star-chamber concerning the courts of justice, he saith, The *Chancery* is only under the King.-----
 My *Chancellor* will bear me witness I never gave him other warrant than to go on in *his court*, according to presidents warranted by law in the times of the best governing Kings and most learned Chancellors---
 These were the limits I gave *him*, and beyond the same *he hath promis'd me he will never go*.--- King *James* the 1st his Speech in the Star-chamber, printed anno 1645.

But it will be objected, that the Chancellor or Keeper cannot be the sole Judge in equity, because there are other persons in the court of Chancery, at least one, *viz.* the Master of the Rolls, who have and do exercise judicial authority on the equity side in Chancery. And the author hath given many instances of the exercise of judicial authority by the Master of the Rolls, on the equity side of the court of Chancery.

In answer hereunto, I readily own that the Master of the Rolls, and also the other Masters in Chancery, have exercis'd, and at this day do exercise *judicial authority* in the court of Chancery: But it is one thing to exercise *judicial authority* in a court, and another thing to be a *Judge* of that court, every officer of a court who assists and helps the Judge in the exercise of judgment, so far as such assistance goes, does a *judicial act*, but yet he is not thereby the Judge.

He that is the Judge of a court, must be the supreme, and final determiner of matters within the same court, and must be able to judge of *all* matters within the jurisdiction of the court, and must likewise have power to execute and make effectual all his judgments and decrees.

But if there be in a court any persons whatsoever, whose judicial acts in that court are not final, but subject to the controul of a superior in that court, whose judicial authority is confin'd to some particular cases, and not extended

tended to all, and who have not power to put their own judicial acts in execution, such persons cannot be called judges of the court, but are only officers of that court, acting by authority from the Judge; and if their judicial acts be not approved by the Judge, they become of no effect; but if approved and confirm'd, then they become the acts of the Judge, and are then as acts of the court, put in Execution by the authority of the Court.

There is not any one Judge whatsoever, at least where the jurisdiction is any way extensive, who can possibly do all the judicial acts of his court; but must from necessity of human nature, in many judicial instances, act by officers under him, which officers were never esteemed thereby to become Judges, but remain, officers still, the Judge acting by them in these instances; so that their acts being approved and confirm'd by the Judge, become the acts of the Judge and of the court.

This may be observed most particularly in the other three courts of *Westminster* Hall: There are four Judges in each of these courts and no more; all the judicial acts done in those courts are done by their authority, and made effectual by their power; but yet not one half of those judicial acts are in fact done by them, they are in fact done by their subordinate officers and ministers, some by one officer, and some by another, not by all alike, but according to their several stations and posts in the
respective

respective courts, and the parts of the judicial power severally allotted them. It is not the Judge, but the officers of the court, who in fact issue and make out the Writs, to bring the parties in, and enter the appearances of the parties, when they do come in. The officers give rules to plaintiffs to declare, and if they do not declare by the time prefixt, award them nonsuit, and tax costs; if the plaintiff doth declare, the officers of the courts respectively assign times for pleading, replying, rejoynings, and the like; and if either party fails at the time assigned, the officers of the court respectively sign judgment against him.

The signing or giving judgment, is the highest act or exercise of judicial power: and yet the much greatest part by far of the judgments in the law courts of *Westminster Hall*, are given unknown to the Judges, and awarded and signed by the officers only. All judgments by *nihil dicit*, *nient dedire*, or *non sum informatus*, are, unless in an extraordinary case, given and signed by the officers only. It is seldom seen unless it be upon demurrers, or special verdicts, for which the reason is obvious, that the Judges do in fact give the judgment.

On general verdicts, the officer for the most part gives the judgment without ever acquainting the court therewith. —————

These are all notorious facts, which every one, who knows any thing of *Westminster Hall*,

Hall, must know to be so; but no one ever imagin'd, that because these several officers have done, and still continue to do these numberless acts of judicature in their respective courts, that therefore they are judges of the court, or have done them in any other manner than in assistance to the Judges of the court, and by their authority: The Judges have still a controuling power over them, and do on complaint set aside, and rectify any thing that hath been done amiss by them; but if there be no complaint against what they have done, then it becomes the act of the Judges of the court, and as such it is executed accordingly; so that all these acts of judicature done by these officers, in their respective courts, are properly speaking, acts of the Judges, or of the court, done by these officers. It is the act of the court, done in and by them.

As for the other, and fourth court of *Westminster* Hall, the court of Chancery, it is there done much in the same manner.

As it is a court of law, the Writs are not in fact made out or ordered by the Chancellor, but by the subordinate officers; the appointing times to declare, plead, and reply, and the signing or giving judgments, are generally done by the officers, without the intervention of the Chancellor; and in general the proceedings at law in this court, are much the same as the proceedings in the other courts of law are. As

As it is a court of Equity, the method of proceedings is different from what it is at law, but according to the nature and form of those proceedings: so there is a suitable assistance given to the Chancellor, by proper officers of the court, who in sundry instances exercise judicial acts in equity, as well as other officers do in law, but neither the one nor the other do thereby become judges in their respective courts.

Eleven of the Masters in Chancery, tho' they do not *now* much insist on the exercise of judicial authority in the court, yet in fact they exercise a great deal at this day, and formerly did much more, the proof whereof will be in the following chapter.

The Master of the Rolls, the other Master of Chancery, hath also exercis'd, and doth still exercise judicial authority on the equity side of Chancery: but it will in the ensuing part of this discourse plainly appear, that this exercise hath been only in aid and assistance of the Chancellor, and by his authority, and that he was not by all this a Judge of the court, but remain'd an officer still.

The author of the late discourse doth admit, p. 107. *the Chancellor to be the supreme Judge, and that there is no other Judge co-ordinate with him; and that when he sits in court, or performs any judicial act, he is sole Judge.* And p. 10. *that the judicial acts done by the Master of the Rolls may be re-viewed*

viewed by the Chancellor, and ultimately refer to his acts.--- And p. 112. that no judicial acts of the Master of the Rolls can be carried into execution but by the Great Seal.---

And he must admit one thing more, *viz. that the Master of the Rolls doth not do all kind of judicial acts on the equity side of the court*, for he never meddles with Demurrers, Pleas or Exceptions, to omit many other matters, which take up a great part of the judicial business of equity in that court. Now what doth the Master of the Rolls do more on the equity side of Chancery, than the officers of other courts do in their respective places? The *orders and decrees* of the Master of the Rolls are not conclusive, but may be discharg'd, alter'd, or confirm'd, by the Chancellor, as to him shall seem just; neither can they be executed but by the Great Seal, which is in the Chancellor's custody: and the Master of the Rolls cannot meddle at all with a very great part of the judicial business of the court: Other officers exercise *as much judicial authority* in their respective courts, and yet are not thereby Judges of those courts; so that there is a manifest difference between being Judge of a court, and exercising judicial authority or acts of judicature in that court.

The Author, when he speaks of the judicial authority of the Master of the Rolls, doth frequently keep himself in general terms,

as that the Master of the Rolls hath *judicial power*; that he hath done innumerable *acts of judicature*; that he hath *exercis'd judicial authority*; that he hath *acted judicially*, and the like. All this may be true, and yet for all this he is no Judge of the court: not only the Master of the Rolls, but other officers, have likewise acted judicially in this court, and done many acts of judicature therein; all which may, and have been done, as by officers in other courts, in aid and assistance of the Chancellor, and by his authority, as will be more particularly made out in the following chapters.



C H A P. III.

That in the Chancery there are several Clerks and Officers under the Chancellor; and that particularly by the constitution of the court, there are twelve ministerial Officers called Clerks or Masters of Chancery, whereof the Master or Clerk of the Rolls is one, who are assistants to the Lord Chancellor, but yet subject to his orders and direction, and by him from time to time deputed and assign'd to such business as the exigency or state of the court requires.

IN all courts there must of necessity be officers and ministers, as well as Judges, and the more extensive the jurisdiction or business of the court is, the greater must the number and variety of the officers be; which officers, especially those of the superior rank, must of necessity do several acts, which in themselves, strictly speaking, are judicial, otherwise it wou'd be impossible for the business of any court to proceed.

This,

This, as hath been shewn, is particularly visible in the three other courts of *Westminster* Hall: there are four Judges in each of those courts, but yet the judicial acts of those courts are not all done by the Judges, but many of them by their officers: the Clerk of the Crown and Master of the King's Bench office, do assign times for pleading and declaring, sign judgments, grant *fiats* for writs of inquiry, and executions, and do many other judicial acts in the King's Bench. The three Prothonotaries severally do the same in the Common Pleas, and the Master of the office of Pleas the same in the Exchequer. Every one who knows any thing of *Westminster* Hall, knows the fact to be so, and sees it done every day; and unless it were so done, there would be in a great measure a failure of justice, and a stop of business.

In like manner, in the court of Chancery, which court, as the author ^a saith, *hath and always had great extent of jurisdiction, and multiplicity of business*; there must be, and there always have been, officers and ministers subordinate to the Chancellor, to assist him in the dispatch of the business of the court, in the exercise and discharge whereof, they must, as the officers in other courts, do several acts which in themselves are strictly judicial, but yet are not thereby any more Judges of the court, than the officers of the

other courts are by such acts Judges of their respective courts, seeing all that they do is only in assistance and aid of the Judge, by an exprefs or imply'd authority from him, and subject to his controul.

In the court of Chancery there is a great number of officers and ministers, some of a superior, others of an inferior rank: it is not my design to treat of them all, or to state particularly their several functions and duties; I shall mention only such as tend to discover where the judicial power of the court of Chancery resides, and the reason of its being exercis'd in several instances by some of the officers of the Court.

Whilst Chancery was only a court of law, a chief part of the business of the Court consisted in framing and granting of writs according to people's cases, and in writing to the Great Seal: the superior officers writ in their own names, and each had more or fewer clerks under them, writing in the names of their respective masters, according as was ordain'd and establish'd in the Court.

The principal and superior officers of the Court, were the *twelve Masters* of Chancery, whereof the Master of the Rolls was the *first* and *chief*. These twelve Masters of Chancery were call'd by several names, to denote their superiority to the other officers of the Court; as

E

Cle-

Clerici de majori gradu,
Clerici de primo gradu,
Majores clerici,
Clerici ad robas,
Magistri Cancellariæ Regis, &
Clerici de prima forma.

Fleta, ^b who wrote before the court of Chancery had any thing to do with matters of equity, relates, that to the Chancellor are associated honest and circumspect clerks, who have a full knowledge in the laws and customs of England, whose duty it is to hear and examine the petitions and complaints of complainers or plaintiffs, and according to the qualities of the injuries shewn, to give them due remedy by the King's writ. And then he goes on to shew the several sorts of writs, some form'd according to the case of the party, others *de cursu*, or of course; that as to those writs which are varied according to the diversity of the case, they are call'd *magistralia*, which plainly refers to the Act of Parliament, 1; E. 1. "That when it shall happen
 " in Chancery that in one case is found a writ,
 " and there is not found a writ in the like case,
 " falling under the same right, and wanting
 " the like remedy, *concordent clerici de Cancellaria in brevi faciendo*", i. e. let the clerks in Chancery agree in making out a writ; which clerks were the ^c Masters in Chancery, and

^b *Fleta*, lib. 2. c. 13. p. 75, 76.

^c 2 Inst. 407.

the writs form'd by them on this statute were from thence call'd *brevia magistralia*, to distinguish them from *brevia de cursu*, that is, from the writs made out of course by the Curfitors; and there is an instance in the Register ^d original, where the Masters in Chancery wou'd not agree to a clause in a writ, because contrary to the course of the Chancery.

These twelve Masters are called by *Fleta*, *collaterales & socij Cancellarij*, and were the Chancellor's standing counsel, to advise and assist him in any arduous or important matter brought before him: there was a pregnant case to this purpose, 12 E. 2.

The Abbot of St. James extra Northampton, being inroll'd *de novo* in the King's Chancery to come to Parliament, he petition'd to be discharg'd, because he did not hold either *per baroniam*, or *de rege in capite*, but in *frankalmoigne*, and neither he nor his predecessors were ever before inroll'd in Chancery, or ever came to Parliament; whereas the Abbot pray'd to be reliev'd, in execution of which petition or bill, *Dominus Cancellarius cum suo concilio de Cancellar' ordinavit*. The Lord Chancellor ordain'd, with his counsel of the Chancery, that the name of the Abbot shou'd be taken out of the registry of the Chancellor. This excuse or allowance was made by the view of John Hotham, Chan-

cellor, *William de Armines*, Keeper of the Rolls, *Robert Bardelby*,--and other clerks of the Chancery.

From this record, the learned Sir *Robert Cotton* in the MS. treatise of the high and honourable court of Chancery, cited by the author, p. 15, 110. makes these several observations: 1. That these Masters of Chancery were stiled to be counsellors to the Chancellor, not *co-judices*; for the words are, *Dom. Cancellarius cum suo concilio de cancellar' ordinavit*, for he is the only Judge in the Court, and the Masters have no voice in judgment as in other courts of justice; for tho' in the King's Bench and Common Pleas there is one Chief Justice, yet the other Justices in their several courts are *co-judices* with them, and have places and voices with them, and so in the Exchequer: but the *Chancellor* is the King's Deputy *alone* in this court, *in all cases*, and if he die and the Master of the Rolls and the other Masters in Chancery do survive him, all *English* bills in that time of vacancy are to be preferr'd, and entituled to the King's most excellent Majesty in the court of Chancery, and not unto the *Custos Rotulor'*, or to the other Masters of the court at *Westminster*. 2. That the Master of the Rolls is the next to the Chancellor, and before the other Masters in Chancery. 3. That in *diebus illis*, the rest of his counsel were stiled Masters of the Chancery, or clerks of the Chancery.

As the twelve Masters were the Chancellor's Counsel in Chancery, so we find them attending the King, together with the Chancellor, in a matter relating to the Chancery. It is in the year-book of 24 E. 3. 35. a. there being a suspicion of a rasure or alteration of a release given of a Recognizance in Chancery, and the same being shew'd to the King, he sent for the Chancellor, Treasurer, Justices and Clerks of the Robes in Chancery, i. e. the Masters in Chancery, to have their opinions concerning the said Deed, and in the 20 E. 3. c. 3. there is mention made of the *King's Counsel* in Chancery, which certainly included the Masters.

The same Sir Robert Cotton, in the same discourse wherein he describes every particular office and officer of the Court, and their duty in their several places, after he had dispatch'd what he had to say concerning the Chancellor, comes to those whom he calls his *assessors or assistants*, which are the Master of the Rolls and the Masters in Chancery.

Sir Henry Spelman, in his Glossary on the word *Chancellor*, * writes, that it may be thought grievous that the fortunes of all men shou'd lie in the court of *one* man's breast; but in extraordinary cases he may have the assistance of the Judges of other courts.----

He hath also certain ordinary ^f *assessors* or *assistants*, viz. *twelve in number*,--- call'd at this day *Masters of Chancery*.--- They sit or attend not altogether, but *silent all*, to give their assistance to the Chancellor, *when he commands it*.

So in the Treatise ^g ascrib'd to the most learned Lord *Elsmere*, cited by the author p. 5. the Chancellor hath *jus edicendi*,--- which concerns his absolute authority, and *jus judicandi*,--- as upon *audita querela*, Petitions of right, &c. where he judgeth according to the form of the common law.---
^h That the Master of the Rolls and the Masters of the Chancery inform him of the law, and ⁱ that the *assistants* to the Lord Chancellor are the *Master of the Rolls and Masters of the Chancery*.

And it can be no doubt but that the Masters are included in the assistants of the court contain'd in the following order: ^k *Upon the hearing, debating and perusing of the matter and cause in question*,--- It is order'd by the right honourable the Lord Keeper of the Great Seal, and other the *Assistants of this Court*, that the cause in question between the said parties be committed, &c.

^f Habet & ordinarios quosdam Assessores.--- Numeroque duodecim.--- Magistros, Cancellarie nunc appellatos; assident vero non omnes simul, sed taciti omnes ministerium precipienti Cancellario exhibituri.

^g P. 107.

^h P. 4.

ⁱ P. 36.

^k *Cowper v. Bele*, Trin. 11 Eliz. 15 June Reg. 90. b.

On the accession of King James the first to the Crown, and at his first publick coming from the Tower through the City of London, there were Lords Commissioners to establish the place and precedence of the several ranks of men, who allow'd unto the eleven Masters in Chancery a place above the Serjeants at Law: this occasion'd a dispute between the Masters and the Serjeants; and in the Cotton Library *Julius F X* 15. fo. 103. there is, or was, a defence of this allowance of place to the Masters, writ by the Masters themselves, wherein they describe the natures of both the functions, viz. of a Master and of a Serjeant at Law, supposing that that wou'd make a short end of the controversy.

The description they give of their own function, is this, *A Master of the Chancery is the King's Majesty's immediate sworn servant, receiving from him Robes, or satisfaction for Robes, twice a year, and anciently divers other allowances for his skill and learning, appointed to be an assessor or assistant to the chiefest temporal officer of the Realm, the Lord Chancellor, sitting by him cover'd in the same bench in the Chancery, one of the highest courts of this Realm, to deliver unto him his opinion and advice in the judicial causes in the same court, and to help him in the speedy expediting of them, upon references reporting the state of divers matters concerning the suits*

there ; and to take Oaths, Recognizances, and Acknowledgments of Deeds, and to do divers other judicial Acts, as well in court as any where else within the Realm, the same to be recorded as done before the King himself ; and also to look that no fraud be done to the King's Seal, and lawfully to counsel the King in things that touch the King, when he shall be thereunto required, and to keep secret the Counsel which he knoweth touching the King ; and anciently to frame and compact all manner of Writs, Patents, and whatsoever was to pass the Great Seal.

There is no objection occurs to me against the truth and justice of this description, whether you consider the court of Chancery either as a court of Law, or as a court of Equity : in either respect the Masters were the principal officers, and in subordination to the Chancellor, did in many instances exercise judicial power and authority.

On the law-side of the court, they made out Patents, Commissions and Writs, and by themselves and clerks were writers to the Great Seal, each Master being allow'd to have three clerks writing under him, and in his name, to the Great Seal, which as to the Master of the Rolls were increas'd to six by the *Ordinationes Cancellariæ Dom' Regis*, made 12 R. 2. which are to be seen in the *Cottonian*, *Ashmole*. and other Libraries.

Another

Another part of their business was to frame new Writs in new and difficult cases, from whence *Fleta* writes, *lib. 2. c. 13. p. 77.* they were call'd *præceptores*, commanders; or *præceptors*, *eo quod brevia, causis examinatis remedialia fieri præcipiunt*, because on examination of cases they command remedial Writs to be made, to which Writs of commandment the Curfitor's Oath appointed by Act of Parliament 18 E. 3. refers.

The ordering or directing some form'd Writs to be made out, was also left to the twelve Masters; for the rule in the ¹Register of Writs is, that when a man goes beyond sea, and is desirous to have a Writ *de Attornato Generali*, unless there be a privy Seal, he must come before one of the Masters in Chancery in proper person, and acknowledge his letter of Attorney, and there must be an indorsement on the back of the Writ; that *A. B.* clerk of the Chancery, hath receiv'd the Warrant of Attorney, which words, to accommodate them to our author's expression, in a like case concerning the Master of the Rolls, p. 54. amount to this, that he shall have a Master in Chancery's *fiat* for such a Writ.

Plaintiffs anciently found Pledges upon original Writs, to prosecute their Suits, which Pledges were found either in Chancery, or before the Sheriff, or in the court where the

Reg. Orig. 21. a.

Writ

Writ was returnable; but as to finding them in the Chancery, there is this note in the *Register*,^m That the favour of finding Pledges in Chancery is not granted to all, but only to the King's Ministers in the court, and others to whom the *Chancellor* of his grace will grant, or *one of the Masters*, that they may be receiv'd.

The legal proceedings in the court of Chancery, are by several accidents, in a long succession of time, much diminish'd; there is but little now left of that sort of business in the court, but yet of that little there are several things done to this day by all the twelve Masters, which import in them the exercise of judicial power or authority on the law-side.

As a *Recognizance or Bail* which is a Record of the court on which the Process of the court issues, may be acknowledg'd or given before a Master in Chancery in or out of court, and is as effectual as a Recognizance acknowledg'd before the Chancellor himself in open court.

A *surrender* of an Office or Lease to the King in Chancery, may be made out of court before a Master in Chancery, and is of the same avail as a Surrender in open court.

An *Affidavit* taken before a Master in Chancery in any place, is of the same effect as an Affidavit taken in open court.

^m Reg. Orig. p. 228.

Deeds indented of Bargain and Sale, and other Writings, acknowledg'd before a Master in Chancery out of court, are of the same effect as an acknowledgment in open court.

These several Acts are *as much judicial* as any of the judicial Acts mention'd by the author in § 11. p. 41, &c. to have been done by the Master of the Rolls on the *common law side* of the court of Chancery, and yet I believe he will not infer in their case as he doth in the Master of the Rolls, that they have jurisdiction on the common law side of the court of Chancery, by virtue of their offices.

But to proceed, After the court of Chancery became a court for Equity, the twelve Masters who were the Council of the Chancellor in matters of law, became also his Counsel and Assistants in matters of Equity: this cou'd not be otherwise, considering the frame and constitution of the court, and especially since the whole progress in Equity is founded on a law Writ: and when Equity first began, the party did not as afterwards take out a Writ of Subpœna of course, but first of all apply'd on his case to the court for a Writ, and the Masters being to judge of cases wherein new Writs not of course were grantable, they must of necessity have been concern'd in the beginning of all Equity Suits, and went on to be Assistants to the Chancellor in the progress of them; an early instance

stance whereof we have in the 21 Ri. 2. where an examination was taken *de præcepto Cancellarij*, by order of the Chancellor, before ^a *Farrington, Stanley, and Wakering*, Clerks or Masters of the Chancery, touching the validity of a Bond then depending in suit in Equity.

At this day the Masters of Chancery do in many instances exercise judicial authority on the Equity side of the court of Chancery, as they take answers and Pleas to Bills, swear the Parties to the truth of their answers and Pleas, administer Oaths to Witnesses examin'd by them, examine Parties upon Interrogatories, take Affidavits, tax and assess Costs, determine References to them from the court in numberless instances, subject nevertheless to the court's controul.

All the twelve Masters in Chancery did heretofore exercise a more extensive jurisdiction on the Equity side in Chancery; and tho' it be not now continued in as ample manner to eleven of them, yet that hath been owing to preferences by Commissions from the Crown, restraints of Chancellors, and other accidents, for they antiently exercis'd the same powers as the Master of the Rolls did, and upon the same foundation, *viz.* by the constitution of the Chancellor, and in his ease and assistance.

^a *Among the Chancery Parchments in the Tower.*

When the Chancellor was present in court, some of them sat with him as assessors or assistants, to give him their assistance and advice in any case before him, when it shou'd be necessary, and to receive references of matters from him. When the Chancellor was absent, they formerly made interlocutory orders, but never gave definitive sentence; and there was not then any difference in this point between the one Master, viz. the Master of the Rolls, and the other eleven Masters; but the whole twelve Masters were as to this part of their power, springing from the constitution of the court, consider'd in one and the same manner, tho' in the later commissions under the Crown there is a preference given to the Master of the Rolls before the other Masters, by making him *one of the Quorum*, and excluding the others, which was not observed in the first commissions; for in these the Master of the Rolls and the other Masters were placed on an equality.

The ancient Ordinances of the court of Chancery were made in the 12 R. 2. and afterwards amended in the time of H. 5. after this there was a renewal of them, with additions and reformatations: The title of the ° last is, *Renovatio ordinum Cancellariæ cum novis additionibus & reformationibus eorundem.*

The first Ordinance therein, is, That there shall be *twelve ordinary Masters of Chancery, as formerly.*

2. That the *Keeper of the Rolls shall be one and the first of the twelve.*

3. That there shall be *three Preceptors* at the will of the Chancellor, during his pleasure.

It is shewn before, that in *Fleta's* time all the twelve Masters were Preceptors, but it appears by the second Article in the Ordinances of 12 R. 2. and of — H. 5. that then there were but *two* Preceptors nominated by the Chancellor.

The 11, 12, 13, 14, 15. Ordinances contain constitutions that there shou'd be *two Registers*, and the several parts of their function and office.

The sixteenth Ordinance is, *Item, that the Keeper of the Rolls, or one of the Preceptors, if they are present, or one of the twelve ordinary Masters present in court, may, at the petition of the Counsel, or Party, or his Attor-*

^p Item quod Custos Rotulor' vel unus ex præceptoribus prædictis, si adsint, vel unus de duodecim Ordinarijs Magistris præsentibus in Cur' poterint ad Petitionem Consiliariorum vel partis seu ejus Attornat', altera parte vel ejus Attornat' præsentem etiam, in absentia Dom' Cancellarij causas dirigere, & in ordinem disponere, viz. Assignare terminos ad respondend', replicand', rejugend', testes producend', eorumque dicta publicand', dies ad causas audiend', & cætera omnia faciend', præterquam quod gratias pro preemptoriarum lapsu non concedant. Nec sententiam definitivam ferant, nam hæc specialiter Dom' Cancellario seu Custodi Magni sigilli refer-
ventur.

ney,

ney, the other Party or his Attorney being present, even in the absence of the Lord Chancellor, direct causes, and dispose them into order, viz. assign times for answering, replying, rejoyning examination of Witnesses, and publication; days for hearing of causes, and do every other thing, except that they are not to grant Graces for the lapse of Peremptories, nor to give definitive sentence; for these things are specially reserved to the Lord Chancellor or Keeper of the Great Seal.

It appears from hence, that by the constitution of the Chancellor, as this *renovatio ordinum*, &c. appears to be, the Master of the Rolls, and other Masters in Chancery, cou'd in the court, even in the absence of the Lord Chancellor, do all things of course, and all other things necessary to bring a cause on to hearing; but the giving definitive sentence in the cause, was reserv'd to the Chancellor or Keeper.

This of it self shews the reason and occasion of all the judicial Acts in Equity, cited by the Author throughout his whole Book, as exercis'd by the Master of the Rolls in making interlocutory Orders home to the giving sentence or judgment: He had authority from the Chancellor to do it, and as to the giving definitive sentence, which was reserved particularly to the Chancellor, the Master of the Rolls doth not even now lay claim to it; but all his sentences and judgments

ments are, as the ^a Author acknowledges, subject to be review'd by the Chancellor, and *ultimately refer to his Acts, and cannot be enroll'd and made decrees of the court, till approved of and sign'd by the Chancellor.*

If there were no instances of the other Masters making interlocutory Orders in the absence of the Chancellor and Master of the Rolls, yet the Master of the Rolls making such Orders, either with or without other Masters, is a proof of the *like right to them*; because they have the *like power and authority by the same constitution.* And if many instances shou'd not be found of any of the other Masters sitting in court alone, it is not to be wonder'd at, because it must very rarely happen that the Chancellor and the Chief of his assistants, the Master of the Rolls, shou'd be both absent together; but yet some instances there are of the *other Masters sitting in court alone, and making interlocutory Orders*, of which the Author himself hath given two specimens in p. 76. where he mentions two Memorandums in the Register-Book, That on *Friday* the 14 *April*, 23 *Eliz.* and the *Wednesday* following, *viz.* the 19 *April*, the Masters of Chancery sat in court, in the absence of the Lord Chancellor and Master of the Rolls; and on those days divers Orders were made upon motions: And it is very probable, tho' there be no par-

ticular Memorandum in the Register, that on the 3d and 5th of ^r *May* following, the Court was then *held before* the Masters *only*, because it appears by the Register that the Lord Chancellor was then absent; and it is as probable that the Master of the Rolls was then kept away by sickness, for he died the 17th of the same month, as the ^r Author thinks, he was for the same reason kept away the said 14th and 19th of *April* before.

As the Masters assisted the Chancellor in hearing motions in court in his absence, and making interlocutory Orders thereon, so they also assisted him in examining into and stating matters refer'd to them by the Chancellor: subject nevertheless to his disapprobation or allowance, by which means they prepar'd business for his determination, and so made it more light and easy to him.

But the matters referred by the Chancellor or Keeper to the Masters, were for the most part, as now at this time, to examine and report, only there are fewer matters refer'd to them now, than heretofore occasion'd by the restraint laid on them by the Chancellor or Keeper.

At this day a great part of business in the court is dispatch'd by the Masters on References made to them by the court; as

Sufficiency of Answers and Examinations.

The *pertinency* and *scandal* of *Bills, Answers, Examinations* and *Depositions*.

The taking of *Accounts*.

And many other particular cases, as they occasionally occur, are at this day from time to time referr'd by the court to the Masters, who thereon make their report, and so state the fact for the judgment of the court.

But heretofore, as it hath been said, there were more matters referr'd to the Masters for their opinion and determination, than there are now; as the consideration of *Pleas* and *Demurrers*, which is now *peculiar* to the Chancellor, were anciently referr'd to the Masters: Some ^t instances whereof are in the Margin, which the Reader may cast his eye upon as he thinks fit.

But

^t It is order'd, that Mr. *Legg*, one of the Masters of this Court, shall consider of the Plaintiff's Bill, and of the Defendant's Plea, pleaded in disability of the Plaintiff's person, to proceed in this Bill, in this Court, and thereof make report to this Court, whether the Defendant ought to answer the Plaintiff's Bill, the said Plea notwithstanding; and as he shall report, so the same is order'd accordingly; And the Defendant's Attorney is to be warn'd when the Premises shall be consider'd of. *Colmore v. Colmore, Trin. 1 Jac. 1. Regist. 744. a.*

Forasmuch as this Court was this present day inform'd on the Plaintiff's behalf, that the Defendants have put in several insufficient Demurrers to the Plaintiff's Bill of Complaint, without shewing any good or sufficient causes thereof, it is therefore this present day order'd, that the consideration of the said Bill and Demurrers be referr'd to Mr. *George Carew*, one of the Masters of this Court, to the end he may report to this Court whether the said Demurrer be sufficient or not; and if not, then a Subpœna is awarded against the said Defendant, to answer directly the Plaintiff's said Bill, and to all the material

But the highest instance of delegating the Chancellor's jurisdiction by References to the Masters, was the referring to them the *hearing and determining of causes*.

By the *Renovatio Ordinum Canc'*, &c. before-mention'd, the giving *definitive sentence* was reserved to the Chancellor; this the Chancellors always preserved, and to this day no one else, no not the Master of the Rolls, doth pretend to give the definitive sentence: But if the definitive sentence had been always given on the Chancellor's actual hearing of the cause, and on his personal distinct knowledge, this wou'd probably have been an hindrance to his other many and great avocations; and therefore one may easily imagine how the method was slid into of referring causes to the Masters, to hear and determine; which References were sometimes to *hear and determine*, and *report* to the Court; on which Report, if nothing was said against it, the Decree made by the Masters, according to the language of those times was ^u *perfected*; or as it is in other Entries, the Master's Report was ^w *ratify'd and confirm'd* by the authority and *decree* of the material points thereof; and the Defendants Attorney is to be warned when the Premises shall be consider'd of. *Jeffe v. Tippen*, 8th al. Pas. 1 Jac. 1. 27 May Regist. 650. a. *Spencer v. Kitley*, Pas. 1 Jac. 1. Regist. 664. a. *Hellhouse v. Stint* 8th ux. Trin. 17 Eliz. Regist. 283. b. 5 Car. Reg. 803. the like.

^u Sir *John Rivers v. Waldron*, 7 July 23 Eliz. Reg. 595.

^w *Newton v. Manley*, 20 May Pasch. 1 Jac. 1. Reg. 591.

court, and the Parties are to stand to, abide and perform the same to all intents and purposes, as if the matter thereof had been judicially set down by the court.

At other times the References were to hear and determine without reporting, and that what they shou'd do thereon shou'd be decreed by the court accordingly. *Appleton v. Cavendish*, Pas. 1 Jac. 1. Regist. 571. b.

I cannot use more pertinent words to this purpose, than those of Sir Robert Cotton, in the MS. cited by the Author, *That the employment of Masters in Chancery was anciently in framing Writs in difficult cases, which Writs so fram'd by them, were call'd Brevia Magistralia, and that learning in the laws of England was required to be in those men; but after Bishops were advanc'd to the office of Lord Chancellor, men of another profession were introduc'd into the court, viz. Professors of the civil and ecclesiastical Law--- And forasmuch as the Masters of Chancery at this day are grave and wise, tho' many of them are of another profession, and not employ'd in framing Writs as at first, yet they do sit upon the Bench with the Chancellor, and he taking advantage of their opportunities and leisure, doth many times refer matters to them, which have depended in that court, and are ready for hearing unto their examinations which upon their Certificates are decreed accordingly.*

I shou'd

I shou'd have thought the authority of Sir *Robert Cotton* sufficient to have proved a fact in and near his own time, that there were References and Delegations from the Chancellor to the Masters, for the *hearing and determining of causes*; but seeing this seems to be question'd by the Author in p. 124, 125. the Reader I hope will not think me tedious if out of a great number of instances in the Registers to this purpose, I transcribe some few in the Margent, and refer to many more.

Sometimes the Reference hath been to the Masters, to *hear* the Cause, and *report* to the Court.

F 3

Some-

** Gimlet v. Lassenby.*

It is order'd, that Mr. *Throgmorton*, and Master *Mitchell*, have the *hearing* of the Matters in variance between the said Parties, and thereof to make *report* to the Court. *Pas.* 37 H. 8. Reg. 68.

Goodier v. Lovel.

This matter is committed to the *hearing* of Master *Leeson* and Master *Grimstead*, and they to make report thereof to the Lord Chancellor. 21 Nov. 2 E. 6. Reg. 224.

Maine v. Morton.

The Matter is committed to the hearing of Master *Croke* and Master *Bellasis*. 3 E. 6. Reg. 116. b.

Leveson v. Leveson.

Comittitur ista materia Magistro Bellasis & Magistro Bretten, audiend' & faciend' Relationem inde. Domino Cancellario 4 E. 6. 20 Feb. Reg. 334. b.

Dormer v. Slow.

The matter between the said Parties in controversy is committed to the *hearing* and examination of Mr. *Vaughan* and Mr.

Sometimes the *v* form hath been for the Masters to *hear and determine*, if they can, if not, to *report*.

* Sometimes to make an end if they can.

Mr. *Weston*, Masters of this Court of Chancery, and they to make *report* of their Proceedings thereon, unto the Lord Keeper of the Great Seal of England. 23 Jan. 4 Eliz. Reg. 165. v. 2 E. 6. Reg. 224. 6 E. 6. Reg. 116.

v Palmer v. Perefall.

Ordered, that all Matters in variance be referr'd to Master Dr. *Hussey* and Master Dr. *Harris*, to *hear, end, and finally* to *determine* the same, according to their *wisdom and directions*, by *Ostabis Michaelis*, if they so can, if not, to certify their Doings, Proceedings and Opinions to the Court. *Lib. de Annis*, 27 & 28 Eliz. p. 690.

Finke v. Filby.

The Matter in controversy between the said Parties, is this day committed to the hearing and examination of Master Dr. *Lewis*, and Master Dr. *Huyck*, and they to *end and determine* the same, if they so can, or else to make *report* thereof to the Lord Keeper of the Great Seal of England. 8 Decemb. 4 El. Reg. 262. a.

Smith v. Wheeler.

Referr'd to Master *Carew* and Master *Harris*, to *hear and determine* this Cause, if they can, if not, to *report*. *Lib. de Annis* 25 & 26 Eliz. p. 62.

* *Beecher v. Calmacy.*

Referr'd to Master Doctor *Carew*, and Master Doctor *Swale*, by all good ways and means, according to their wisdom and discretion, to make *an end if they can*. *Lib. de Annis*, 25 & 26 Eliz. p. 83.

Finch v. Baker.

Referr'd to Master Dr. *Carew*, and Master Dr. *Forth*, to *hear and determine* this Cause, if they can. *Ibid.* 163.

Griffin v. Lorkin.

The Matter in variance between the said Parties, is committed to Sir *Richard Reade*, Knt. to examine and determine the same if he can, or else to make Certificate thereof to the Lord Chancellor. *Mich. 1 Mar. Reg. 401. b.*

Some-

^a Sometimes to *hear* and *determine*, and that what they do shall be *decreed by the Court* accordingly.

^b *Time and Place* have been sometimes appointed to the Masters for the *hearing* the Causes referr'd to them.

A ^c *particular time* hath been sometimes appointed for the Masters to make their *Report*.

Appleton v. Cavendish.

^a Order'd, that all Parties shall attend the said Masters of this Court, (*viz.* Master *Stanhope*, Master *Tyndale*, and Master *Grimston*) at such time as they shall appoint, to the end they may hear the said Causes at large, and thereupon end and determine the same, and what they do therein shall be decreed by this Court accordingly. *Pas. 1 Jac. 1. Reg. 571. b.*

^b *Morbes v. Carr.*

Materia inter eos committitur Magistro Read & Magistro Standish, Audiend' apud Rolles, die veneris prox' post meridiem, & faciend' Relationem inde Domino Cancellario. Pas. 4 E. 6. 13 Maij Reg. 222. a.

Tooley v. Downs.

Forasmuch as the day which was appointed for hearing the Matters between the said Parties is now pass'd, it is order'd that the Matters shall be *heard* by Master *Oliver* and Master *Bellasis*, *Ostabis Martini next*, and that a Subpcena be awarded against the Defendant to appear at the same day: and that they shall call before them such Merchants, and such others, as they shall think requisite for that Matter, according to a former Order. *6 Nov. 2 E. 6. Reg. 195. b. v. ibid. 222. a. b.*

Thelked v. Butler.

^c It is appointed that Mr. *Oliver*, who hath heard the Matter, shall report it to the Lord Chancellor, on *Saturday* next in the forenoon. *3 E. 6. 9 Ap. Reg. 78. a.*

^d Reports of this nature have been made by Masters, and *their Decrees* have been made *the Decrees* of the Court.

Wymarsh v. Dance.

Ista materia committitur Magistro Oliver & Magistro Hussey, ad audiend' & faciend' Relationem Domino Cancellario die Mercur' prox' futur' post meridiem. R. Rich. Cancell' 8 Feb. 3 & 4 E. 6. Regist. 170. b.

Aldridge v. Lowland.

The Matter in controversy between the said Parties, is by order of this Court compromitted to the *bearing and examination* of Master Doctor *Lewis*, and Master Dr. *Huyck*, Dr. of Laws, and they to make report thereof of their proceedings therein, *between this and Monday next.* 28 Oct. 3 Eliz. Reg. 57. a.

Daniel v. Fielding.

Materia inter eos committitur Magistro Oliver & Magistro Standish, audiend' & ad faciend' Relationem die Sabbati. 5 Feb. 2. E. 6. Reg. 270. simile Strong v. Lewin. ib. 281. b.

Newton v. Mauley.

^d Upon reading of a Report made in this Cause by Master Doctor *Amye*, one of the Masters of this Court, it is order'd, that the said Report, and the Matters therein contain'd, be ratify'd and confirm'd by the authority and decree of this Court, and that both Parties shall stand to abide and perform the same to all Intents and Purposes, as if the Matter thereof had been judicially set down by the Court. 20 May Pas. 1 Jac. 1. Reg. 591. b.

Turner v. Turner.

Upon the hearing the matter in variance between the said Parties, before Mr. Dr. *Huick*, and Mr. Dr. *Hervey*, two of the Masters of this Court, (to whom the consideration of the Cause was committed) Forasmuch as it hath appeared by the Depositions of certain Witnesses in this Court, that *J. Turner* the Testator of the said Defendant at the time of his death, did owe unto the Plaintiff 14 *l.* and no proof being made of the satisfying the same hitherto, *It is therefore order'd*, that the Defendant shall pay to the Plaintiff, before the Feast of the Annunciation of our Lady next coming, the said 14 *l.* *Hill. 11 Eliz. Regist. 373. a.*

T. Huick.

Hen. Hervey.

If

If the Reader be willing to see any more of this kind, he may find numberless instances scatter'd up and down in the Registers; particularly *Toxall v. Griffith*, 21 Oct. 3 E. 6. Regist. 101.—*Warren v. Kingscot*, 28 Oct. 3 E. 6. Regist. 108. a.—*Hawkins v. Toller*, 25 Nov. 3 E. 6. Regist. 137. b.—*Minster v. Leeson*, 26 Nov. 3 E. 6. Regist. 139. b. *Pledall v. Lymrege*, 4 Feb. 4 E. 6. Regist. 163. a. *Carleton v. Woolley*, 11 Feb. 4 E. 6. 173. b.—*Bainton v. Chafin*, 29 Ap. 4 E. 6. 200. b.—*Fish v. Sulliard*, and *Cull v. Nichol*, 14 Nov. 3 E. 6. Regist. 126. b.—*Colley v. Kerle*, 21 Nov. 3 E. 6. Regist. 132. b.—*Oxman v. Woolaston*, 28 Nov. 3 E. 6. 143. b. 4 Feb. 4 E. 6. 163. a.—*Raimer v. Raimer*, 8 Feb. 4 E. 6. Regist. 170. b. ——— *Cock v. Gostwick*, 30 Apr. 4 E. 6. 202. a. ——— *Wyn v. Roper*, 4 E. 6. Regist. 206. a. b. ——— *Crane v. Humphry*, 5 May, 4 E. 6. Regist. 208. b. ——— *Carr v. Rotherford*, 7 May, 4 E. 6. Regist. 212. b. ——— *Onces v. Monnynch*, 13 May, 4 E. 6. Regist. 221. b. and the 19 May, 4 E. 6. Regist. 230. a. ——— *Waters v. Millward*, 13 May, 4 E. 6. Regist. 220. b. ——— *Bennet v. Baines*, Pas. 1 Jac. 1. Regist. 561. b. ——— *Snagg v. Snagg*, Pas. 1 Jac. 1. Regist. 576. a. ——— *Spicer v. North*, Pas. 1 Jac. 1. Regist. 576. b. ——— *Warner v. Dilks*, Pas. 1 Jac. 1. 559. b. ——— *Palmer v. Palmer*, Pas. 1 Jac. 1. Regist. 562. b. ——— *Moyle v. Ewel*, Pas. 1 Jac. 1. Regist. 661. b. ——— *Lorkin v. Lorkin*, 7 May,

20. *Eliz. Regist.* 329. *b.* ---- *Markham v. Markham*, 17 *Jan.* 20 *Eliz.* 389. *b.* ---- *Byard v. Byard*, 3 *July*, 21 *Eliz. Regist.* 273. *a.* ---- *Cuttle v. Chibborn*, *ibidem*, 276. *b.* ---- *Stichard v. Tate*, *ibidem*, 279. *b.* ---- *Ballard v. Lee*, 6 *May*, 25 *Eliz. Regist.* 455. *b.* ---- *Torry v. Clifton*, *Regist.* 6 & 7 *E.* 6. 78. *a.* ---- *Succliffe v. Brodgen*, *Trin'* 1 *Mar. Regist.* 167. *b.* ---- *Christopherson v. Butler*, *ib.* 175. *a.* *Clerk v. Oxenden*, *ibidem*, 181. *a.* ---- *Griffin v. Lockin*, *ib.* 183. *a.* ---- and other like cases; *ibidem*, 221. *a.* ---- *Gwinmeth v. Richard*, *Pas.* 1 & 2 *Phil. & Mar. Regist.* 350. *b.*

The precedent instances are all of References or Delegations to the eleven Masters, or to those who are now vulgarly call'd the Masters of Chancery; from whence it is not to be inferr'd, that the like References or Delegations were not made to the twelfth and other Master, the Master of the Rolls, but on the contrary, the like References and Delegations, for hearing and determining Causes, were made by the Chancellor, or Keeper, to the Master of the Rolls, in like manner as to the other Masters; sometimes to him *singly*, sometimes to him and others *joyntly*, there not being in this respect, any difference between him and the other Masters: But inasmuch as the next chapter is more particularly design'd for the consideration of the Master of the Rolls's judicial power, I shall reserve the instances of this kind to that chapter, that so the reader
may,

may, as far as is possible, have, in one view, the whole relating to the *judicial power* exercis'd by the Master of the Rolls.

These Delegations or References to the Masters to hear and determine Causes, and report to the Chancellor or Keeper, were in use till Sir *Francis Bacon's* time, who laid a restraint upon them, as appears by his Speech to the Court on the 7 *May*, 1617. when he first took his place as Lord Keeper in the Court of Chancery, and by his ^e Orders publish'd sometime after. In his Speech, which is extant in several MSS. he gives the Court an account of what charge the King had given him, and of what resolution he had taken. In conformity thereunto, one charge of the King's was, that *he shou'd contain the jurisdiction of the Court within the true and due limits, without swelling or excess*: As to which he said, he had taken several resolutions, one was, *that he wou'd keep the Keys of the Court himself; he wou'd never refer any Demurrer or Plea (tending to discharge or dismiss the Court of the Cause) to any Master of the Chancery, but judge it himself, or at least by the Master of the Rolls*: Another resolution was concerning *the communicating the authority of the Chancellor too far, and making upon the matter too many Chancellors, by relying too much upon Reports of the*

• Vide these Orders in print.

Masters of Chancery, as concludent. I know, says he, the Masters in Chancery are reverend men, and the great mass of business in the Court cannot be sped without them, and it is a thing a Chancellor may soon fall into for his own ease, to rely too much upon them; but the course that I will take generally shall be this, that I will make no binding order upon any Report of one of the Masters of Chancery, without giving a seven night's day, at the least, to shew cause against the Report.

In his orders, which were afterwards published on the 23 Jan. 1618. the 45 order is, *That no References upon a Demurrer or Question, touching the jurisdiction of the Court, shall be made to the Masters of the Chancery, but such Demurrers shall be heard and ruled by the Lord Chancellor himself; and the 47 order is,*

No Reference shall be made to any of the Masters of the Court, or any other Commissioner, to hear and determine, where the Cause is gone so far as examination of Witnesses, except it be in special Causes of Parties, near in blood, or of extreme poverty, or by consent or general Reference of the state of the Cause (except it be by consent of the Parties) to be sparingly granted: And pursuant to this, his successor, ^e Archbishop Williams, declared, when he first took his Seal in Chancery, that he

^e Vide Hacker's life of archbishop Williams, p. 74.

wou'd be *as cautelous as he cou'd in referring Causes* : Since which time the Reference of Demurrers, or of hearing and determining of Causes to Masters, have been very sparingly, if at all, granted; for which latter there hath been the less occasion, because from that time to this, there hath been a series of successive Commissions from the Crown, as is acknowledg'd by the author in p. 90. and whereof farther will be said in the following chapter.

From this brief account of the offices and acts of the Masters in Chancery, of whom the Master of the Rolls is the *first and chief*, the reader may possibly imagine, that the propositions laid down by the author, concerning the *Master of the Rolls*, are for the most part, *mutatis mutandis*, applicable to the *Masters of Chancery*. — *That the offices of Masters of Chancery are antient offices, and in the nature of them proper to have judicial power.* — *That the Masters in Chancery have, and always had jurisdiction on the common law-side, by virtue of their offices.* — *That the Masters in Chancery have always exercis'd judicial authority, on the Equity side of the Court of Chancery, and have done judicial acts, not warranted by the King's Commission; and that the Chancellors have, from time to time, carried judicial acts of the Masters of Chancery, done by virtue of their offices into execution, by the Great Seal, and have ground-*
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ed judicial acts of their own, upon such acts of the Masters in Chancery.—— May not all this be as truly said of the eleven Masters, as of the other Master, the Master of the Rolls? But will any one from thence infer, that the eleven Masters are eleven *subordinate Judges* in the Court of Chancery? Doth not every one see, that they are still but eleven officers of the Court, tho' of a superior rank, and that whatever judicial authority they exercise, it is like the ministerial officers in all other Courts, by *communication* of authority from the Judge of the Court, in *aid* and *ease* of him, and subject to his review and controul; and if this be the case of the eleven Masters, what is there to distinguish the other Master, the Master of the Rolls? He is indeed the *primier or first* Master, but still he is but a *Master*, and hath not lawfully exercised any judicial power in the Court of Chancery, but as one of the Masters, except where he receiv'd his authority by the King's Commission, which shall be the particular subject of the following chapter.



C H A P. IV.

That the Master of the Rolls is no Judge in Law or Equity, in the Court of Chancery; but whatsoever judicial Power he hath lawfully exercis'd, hath been either as one of the twelve Masters in Chancery, or by virtue of the King's Commission.

THE Keeper, or Master of the Rolls of the King's Chancery, is an officer of great antiquity and dignity in that Court.

Sir Robert Cotton in the MS. treatise of the Court of Chancery, cited by the author p. 15. writes that the *Custos Rotulor'* or Master of the Rolls, hath been an officer in this Court, of as long continuance as the Chancellor hath been a Magistrate; where you see the Chancellor is a Magistrate, the other only an officer, the one the Judge, the other a minister of the Court, viz. the Keeper of the Rolls, one of the Clerks of the first form in Chancery.

The reader will here reflect on the proofs in the first and second chapters, that the
Chan-

Chancellor is the *sole and only Judge* in Chancery, both in *Law* and *Equity*, and if those proofs be evident and conclusive, as I think they are, the consequence will then be unavoidable, that the Master of the Rolls cannot be a Judge too; and it will then likewise follow, that if the Master of the Rolls hath in any instances acted judicially, it cou'd not be done by him as a Judge, but by some power or authority derived to him, either from the *Crown*, or the *Judge* of the Court.

The Proofs contain'd in the first and second Chapters of the Chancellor's being the sole Judge in Chancery, are for the most part in the affirmative, and taken from the Chancellor or his Office, which do indeed in general imply a negative, that no one else besides the Chancellor is a Judge.

But in this chapter I shall consider this matter more particularly, with relation to the Master of the Rolls and his office, and shew from several reasons and facts peculiar to him and his office, that whatever judicial Acts are lawfully done by him, are not done by him as a Judge of the Court, or *virtute officij*, but by commission from the King, or authority derived to him from the Lord Chancellor.

The Master of the Rolls is a double officer of the court, he is both Keeper or Master of the Rolls, and a Master in Chancery; he

he hath in himself these two offices, the custody of the Rolls, and one of the masterships of Chancery: Now tho' one person hath both these offices, yet the offices are distinct and several, as is observed by the Author, p. 20. and these offices and their respective powers, tho' united in one person, are to be consider'd as distinct and several.

The nature of the office of Master or Keeper of the Rolls, appears in the Grant it self; and that there may be no mistake in it, I shall here set down the Grant, as made to the present Master of the Rolls.

REX omnibus ad quos, &c. salutem.
 Sciatis quod nos, de *Integritate, Experientia, & provida Circumspectione*, dilecti & fidelis nostri *Josephi Jekyll Militis, plurimum confidentes, necnon pro diversis alijs bonis causis & considerationibus nos ad præsentes specialiter moventibus*, de gratia nostra speciali ac ex certa scientia & mero motu nostris constituimus, ordinavimus & stabilivimus, ac per præsentes, pro nobis, hæredibus & successoribus nostris constituimus, ordinamus, & stabilimus eundem *Josephum Jekyll, Custodem sive Magistrum Rotulorum, Librorum Brevium, & Record' Cancellar' nostr' Angliæ, ac hæredum & successorum nostrorum*, ac eidem *Josepho Jekyll Offic' Custodis sive Magistri Rotulorum,*

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Librorum Brevium & Record' prædictorum, una cum omnibus & singulis vad' feod' regard' emolument' profic' jur' libertat' & præbement' quibuscunque offic' præd' quoquomodo pertinent' sive spectant' damus, & pro nobis hæredibus & successoribus nostris concedimus per præsentēs; & ulterius de ampliori gratia nostra speciali, ac ex certa scientia & mero motu nostris, pro nobis, hæredibus & successoribus nostris, damus & concedimus eidem Josepho Jekyll, Custod' Domus sive Hospitalis converfor' pro habitatione Custodis sive Magistri Rotulorum, Librorum Brevium, & Record' præd' per Prædecessores sive Antecessores nostros, quondam Reges vel Reginas Angliæ ab antiquo ad eundem usum disposit' limitat' & annexat' una cum omnibus edific' hort' garden' & pomar' eidem dom' sive hospital' quoquomodo debet' pertinent' sive spectant' Quæ quidem Dom' sive Hospital' scituat' in quodam vico sive plateo vocat' Chancery Lane in paroch' Sancti Dunstani in le West London; Habendum, tenendum, gaudendum, exercendum & occupandum præd' officium Custod' sive Magistri Rotulorum, Librorum Brevium & Record' prædict' ac Custod' Domus sive Hospitalis prædict' necnon cætera præmissa cum suis pertinent' eidem Josepho Jekyll per se vel per sufficien' Deputat' suum sive Deputatos suos sufficientes pro termino vitæ ipsius Josephi Jekyll, cum omnibus jur' & pertinent'

tinent' quibuscunque ad officium illud sive ad
 Domum sive Hospitalern prædict' pertinent'
 sive spectant' percipiend' annuatim vad' feod'
 regard' commoditat' emolument' & profic'
 quæcunque eidem officio ab antiquo quoquo-
 modo debet' & consuet' una cum omnibus &
 omnimodis al' Jur' libertat' præhemenen' pro-
 fic' emolument' manucaption' loc' & perti-
 nent' quibuscunque officio quoquomodo per-
 tinen' sive spectan' in tam amplis modo & for-
 ma prout *Edwardus Dominus Bruce, Thomas*
Egerton Miles, antehac Dominus Cancellar'
Angliæ, Gilbertus Gerrard Miles, Willielmus
Cordell Miles, Nicholaus Hare Miles, Rober-
tus Bowes Miles, Robertus Southwell Miles,
Christopherus Hales Miles, Julius Caesar
Miles, Dudleius Diggs Miles, Carolus Caesar
Miles, Johannes Dominus Culpeper, Har-
bottle Grimston Barr' Johannes Churchill
Miles, Henricus Powle Armiger, aut Jo-
hannes Trevor Miles; aut aliqui alij Custodes
 sive Magistri, aut aliquis alius Custos sive Ma-
 gister dictorum Rotulorum, Librorum Bre-
 vium & Recordorum, necnon Domus sive
 Hospitalis præd' hujusmodi aliqua vad' præ-
 heminen' libertat' profic' emolument' manu-
 caption' loc' & cætera præmissa ante hæc
 tempora recipere & percipere consueverunt,
 seu eorum aliquis recipere vel percipere con-
 suevit; & ulterius de uberiori Gratia nostra
 dedimus & concessimus, ac per præsentes, pro
 nobis,

nobis, hæredibus & successoribus nostris damus & concedimus eidem *Josepho Jekyll*, un' dolum sive duas pipas Vini Gascon' habend' & percipiend' eidem *Josepho Jekyll*, singulis annis, pro termino vitæ suæ, de vinis nostris hæredum & successorum nostrorum circa Festum Paschæ aut aliquo alio tempore post & juxta id quod vintag' se habet in portu nostro *London*, per manus capital' pincern' nostri Angliæ vel hæredum sive successorum nostrorum seu ejus Deputar' ibidem vel per manus receptor' vinor' nostror' seu al' officiariorum nostrorum hæredum vel successorum nostrorum quorumcunque ibidem pro tempore existent'. In cujus rei, &c. Teste Rege apud *Westm'* decimo tertio die *Julij*, anno regni Regis *Georgij* tertio.

The Reader may see that it is the *keeping* of the *Rolls, Books, Writs, and Records* of Chancery, that is hereby granted; there is nothing in the Grant of any *judicial power and authority*, the whole that is expressly granted, is *ministerial*; and that nothing more is included therein, appears from the ancient Oath of the Keeper or Master of the Rolls, taken by him on his admission to his office, which was *well and faithfully to keep the Rolls of the Chancery*. Thus *Henry de Cliffe*, who was admitted to be Keeper of the
Rolls

Rolls of Chancery, 18 E. 2. did on his admission take an ^s Oath well and faithfully to exercise that custody, and his successor *Michael de Watch*, when he was made Keeper of the Rolls of Chancery, 7 E. 3. did in like manner take an ^b Oath *de custodia illa bene exercenda*, i. e. well and truly to execute the said custody.

The taking of the Oath of office in this manner, hath been for *some* time diffus'd, and the Oath which the Master of the Rolls now takes, is the Oath of a *Clerk* or *Master* of Chancery, appointed to be taken by the Masters, by Act of Parliament, 18 E. 3. only; whereas the Act of Parliament prescribes it to be taken in this manner, "Ye shall swear that well and lawfully ye shall serve our Lord the King, and his People, in the office of Clerk of the Chancery, to which ye be attitled, &c." The Master of the Rolls, as I am inform'd, tho' by what authority I know not, takes it thus, *Ye shall swear, that well and lawfully ye shall serve our Lord the King, and his people, in the office of Clerk of the Chancery, or Master of the Rolls, to which ye be attitled, &c.*

^s Præstitit sacramentum de Custodia illa bene & fideliter exercenda. *Ryley* 576.

^b Pat. 7 E. 3. Dors. Claus. m. 35.

This is the taking the lawful oath, as he is one of the Masters in Chancery; but whether it be, as the author affirms, p. 19, 20. the taking the *same* oath, as the *antient* oath of the Master of the Rolls was, or the *adding* the old oath, antiently taken by the Master of the Rolls, to the new oath prescribed by the Statute of 18 E. 3. to be taken by the Masters in Chancery, the reader will consider; it is sufficient for my purpose, that the true and antient oath of the office was only *well and faithfully to keep* the Rolls of Chancery, and doth not include in it any other power, but what was purely ministerial.

Whether it be *proper* that the Keeper of the Rolls and Records of a court, shou'd be a *Judge* of the same court, is of no consequence; the title of the author's first section in p. 15. is indeed, *that the office of Master, or Keeper of the Rolls, is an ancient office, and in the nature of it, proper to have judicial power*; but that doth not seem to me to be material; the question here is upon the fact, whether it be *so* or *no*, and that must be determined by the usage and practice, and such like arguments; but when the author advances a step farther in p. 29. and affirms, that the office of Master or Keeper of the Rolls, appears from the nature and constitution of it, not only proper, but necessary to have judicial power; I cannot pass over *that* without

out saying, the author hath not *proved it*, and that the common understanding of every reader will inform him, that it is not necessary that the Keeper of the Acts of a Court, shou'd be a Judge of the Court; a man may most certainly be the Actuary of a Court, without being a Judge of the Court, and may have the custody of the Decrees and Records of a Court, without having judicial power in that Court; the one office doth not necessarily involve or include the other in it.

As the grant of the Mastership of the Rolls expresses only a ministerial authority, and doth not necessarily, or *ex vi termini*, include in it any judicial power; so there are several arguments arising from the manner wherein this office hath been, and is granted, which shew it to be only ministerial and not judicial.

As, This office hath been frequently granted in *Reversion*, and hath been enjoy'd and held under such Grants, and it is a rule of law that a judicial office cannot be granted in *Reversion*. As to the fact, the author owns it to be true p. 29. *that Reversionary grants have sometimes (tho' not often) been made of the office of Master of the Rolls; what he means by not often, I cannot tell; there have been at least half a dozen of them, and enjoyments under such grants; so that the fact being admitted and certain, the next point is as to the law, and there it is a known establish'd*
G 4
rule,

rule, that *officia judicialia non concedantur antequam vacent*: Judicial offices cannot be granted till they are vacant: And so it was resolved on conference between the two Chief Justices and Chief Baron, in Auditor Curle's case. *Hill. 7. Jac. 1. II Co. 3, 4.*

This case of Auditor Curle, the author admits to be so in p. 31. and that this case as a general rule is, and ought to be taken for law at this day: If this then be law, that a judicial office cannot be granted in reversion, and this office, which includes nothing of judicature in its nature, hath, at several and distant times, been granted in reversion, and such Grantees have enjoy'd the office by virtue of such grants: It is a strong proof that this is only a ministerial office, and not a judicial one.

Another argument against the Master of the Rolls office being a judicial office, arising from the manner wherein this office hath been granted, is, *That the office of the Master of the Rolls hath been usually granted to be exercis'd by Deputy.*

It is another rule of law, that a judicial office is a personal trust, and cannot be granted to be *executed by Deputy*; this is so well known, that there is no need to quote authorities to prove it; I shall therefore only cite and express one out of the book call'd, *The Diversity of Courts*, writ in the time of H. 8.

i If

i If the King makes a Judge to have and to hold that office by himself, or by his sufficient Deputy, for the term of his life, the grant is void as to the Deputy, and if the King grants it to him and his Assigns, he cannot make an Assign: No man ever imagined that any Judge in Westminster-Hall could make a Deputy to supply his judicial place on the Bench.

It is therefore an evidence that the Master-ship of the Rolls is no judicial office, because it hath been generally granted to be exercis'd by Deputy, and that which makes the objection stronger, is, that in fact it hath been exercis'd by Deputy.

The author admits in p. 34. that the office hath been usually granted to be exercis'd by the Grantee or his Deputy, and that there is an instance of such a deputation, viz. *A deputation by the Lord Ellesmere to Mr. Lambard, anno 1597.* The author indeed alledges several matters to avoid the force of this deputation, and of Mr. Lambard's acting under it, which I shall particularly examine in another place.

John Waltham was Keeper of the Rolls 8. R. 2. — In those days the Masters of the Rolls were not made by Patent, as now, but by immediate constitution and admission thereon. *John Waltham* being Keeper of the Rolls, and likewise Archdeacon of Rich-

† Vide *Diversité des Courts* Edit' 1561, p. 104. a.

mond, and having occasion to go sometimes to Richmond to visit his Archdeaconry, the King ^k granted to the said John Waltham, that as often as he should absent himself for the said cause, or any other reasonable cause, he might depute, and put in his place any person, which should appear sufficient to the Chancellor, for the time being, to do and exercise for him in his absence the foresaid office, in all things as the said John Waltham should or might do if he were present, the power of the Deputy after his return entirely ceasing.

In this case the King granted liberty to the Master of the Rolls, as often as he pleased, with the approbation of the Chancellor, to make a Deputy in omnibus in every thing that he himself cou'd do by virtue of his office.

^k Rex omnibus ad quos &c. Salutem. Sciatis quod pro eo quod sumus Informati quod dilecto Clerico nostro Johanni d' Waltham Custodi Rotulor' Cancellario nostro, qui Archidiaconus Richmond. ad præsens existit multimode oportebit se aliquando versus archidiaconatum præd' trahere ad visitand' ibidem & cur' suam exercend' sic quod ipse Servizio nostro in officio præd' in persona sua continue intendere non potest, de gratia speciali nostra concessimus dicto Johanni quod quandoque ipsum oportuerit se ex causa præd' seu alia rationabili absentare idem Johannes deputare & dimittere possit loco suo Quandam personam quæ Cancellario nostro pro tempore existenti sufficiens videbitur ad faciendum & exercend' pro eo in absentia sua officium præd' in omnibus prout idem Johannes faceret seu facere posset si præsens foret, potestate huiusmodi deputati post redditum ipsius Johannis cessante penitus & omnino. In cujus, &c. Teste Rege apud Westm' 20 Die Febr. Anno regni sui octavo.

Rot. pat. 8 R. 2. p. 2. m. 26.

Per brev. de privato Sigillo.

This

This indeed is agreeable to the nature of deputations and deputies, which latter, according to the general rule of law, have all the authorities and powers of their principals in them ; but this shews that the Master of the Rolls's office had no judicial power in it to be deputed. Can any man think that by virtue of this license *John Waltham*, as often as he had occasion or a mind to be absent, cou'd make or unmake a Judge in the highest Court : This power he must have had if the Master of the Rolls's office was a judicial office, but this evidently shews, that it was only a ministerial office ; and accordingly in fact when Mr. *Lambard* was Deputy, he did no other than ministerial acts by virtue of such deputation. It is a most convincing proof, that the office of the Master of the Rolls is only ministerial, because he may make a Deputy, which a judicial officer cannot, and because such Deputy hath never done any other than ministerial acts.

There is yet another objection, arising from the manner the office of the Master of the Rolls hath been granted in, to shew that it is no judicial office, and that is, that it hath been granted to *two persons* and *the survivor of them* ; in which cases there may be *two Judges* made instead of *one*, which is contrary to the author's suppos'd constitution of the Court ; or the two Judges may, by *their disagreement*, be in fact none, and if one of the

two dies, then only *one* Judge remains, and the number of the Judges is thereby *lessen'd*, and become *arbitrary and uncertain*, according to *accidents and contingencies*.

The author takes notice of this in p. 37. but the answer there is, *it has so slight a foundation in fact, that it is scarce worth notice, for there is but one instance of the kind, and that in a case so particular, that no general conclusion can be drawn from it.*

What the author means by a *slight foundation in fact*, I do not know; it is a *true* fact, and such as he owns; the Patent is extant, and every one may see that it is a fact well founded, and tho' there was no other instance of such a grant, yet this instance is undeniable, that the 13¹ Nov. 1 H. 7. the King granted the Mastership of the Rolls to *Robert Morton* and *William Elliot*, for the term of their lives, and of the longer liver of them; and as to any particularity in that case, to distinguish it from others, I find none.

The sum of what hath been said, relating to the office of the Mastership of the Rolls, is, that there is nothing in the grant itself, besides the keeping of the Rolls and Records of the Court; that the oath of his office is well and truly to keep the Rolls and Records of the Court; that there is nothing of judicial power express'd either in the Patent or oath,

¹ Vide Rot. Pat. 1 H. 7. p. 4.

but whatsoever is mentioned in either, is ministerial; and that this office hath been granted in *reversion*, to be exercis'd by *Deputy*, and to *two*, and the *survivor* of them; which are all clear and evident marks, that the office is not in its nature judicial but ministerial; so that the author's affirmation in p. 29. *That the office of Master of the Rolls appears from the nature and constitution of it, proper and necessary to have judicial power*, is without any grounds or foundation; the inference seems to be evidently otherwise: The grant and oath of the office plainly describe it to be only a ministerial office, and it hath been granted, in such manner, as ministerial offices may be; but as by the general rule of law judicial offices can't be: The conclusion then is plain, that this office of the Custody of the Rolls, is merely ministerial, and no way judicial.

There is another consideration to prove the Master of the Rolls to be *only* a ministerial officer, and *no Judge* of the Court, which ariseth from the *union* that hath been of this office, with that of the Chancellor or Keeper; the judicial power of the Chancellor, and the office of Master of the Rolls, have been frequently in the *same hand*: Now if by the constitution of the Court there are to be two Judges in it, the one *supreme*, the other *subordinate*; the subordinate is as much a part of the constitution as the
supreme,

supreme, and the Court can be no more without the one than the other; and it is impossible that one man can be both, the same person cannot be *both* supreme and subordinate.

The Author saith, p. 7, 8, and 9. *The Court of Chancery is a Court of great business, and much labour is requir'd to go thro' it: For this reason, the constitution of this Court did wisely invest two great Officers of the Crown with a judicial power, not co-ordinate as in other Courts the Judges are, but in a subordination of the one to the other, for the Chancellor is the supreme, and the Master of the Rolls a subordinate Judge in the Court; that by reason of the great avocations of the Chancellor, there was wanting some person to whom the suitors of the Court might resort in his absence for the dispatch of business: And accordingly the suitors may, and always have applied to the Master of the Rolls for justice in that Court, who either with or without the assistance of the Judges, hath distributed it to them in the same manner as hath been done by the Chancellor.--- That it was not possible wholly to supply the absence of the Chancellor by special commissions to the Judges, for they are employ'd in their proper business, and can only meet at stated times, and at some seasons of the year are dispers'd.--- That delay is very grievous in any Court, and more so in this court.--- That to provide against this delay,*
seems

seems to have been the policy of the law, in molding the Court of Chancery, when it invested the Master of the Rolls with a jurisdiction by virtue of his office, in aid of the jurisdiction of the Chancellor, not co-ordinate with it, whereby the prebeminence of that high office is preserv'd, the unity of jurisdiction of the court is maintain'd, and the business of the suitors is dispatch'd.---^m That the business of the court is divided between them.----ⁿ That they sit at different times and places, respectively, as it were, by turns.----^o That without this jurisdiction of the Master of the Rolls, delays to the suitors would be intolerable.

All this reasoning may be fine, and if a Court of Chancery were now to be moulded, possibly it might be adapted to this model ; but the facts that have happen'd, shew that it was impossible that this present Court of Chancery should ever have been so framed. If the judicial power of the Chancellor, and the Mastership of the Rolls, have been in one and the same person, then it is impossible that the Author's scheme could ever have been the constitution of the Court. The Author's scheme is, that there are two Judges in the Court, the one supreme, the other subordinate; in this case the supreme and the subordinate are the same, and yet this case hath happen'd very frequently in the Court.---

^m P. 90, 10.

ⁿ P. 102.

^o P. 10.

The 8th of *June*, 1467. the Seals were taken from the Archbishop of *Tork*, and the same day the King deliver'd the Seal to *Robert Kirkham*, Master or Keeper of the Rolls, *sub modo & forma sequentibus, viz.*

That the course of the law, and ministration of justice, might not be let, to seal all manner of Writs, Letters Patents, &c.

That he used not the said Seal, but in the presence of the Earl of *Essex*, Lord *Hastings*, Sir *John Fogg*, Sir *John Scott*, three, two, or one of them; and when the sealing is done, to put it again into the bag, to be seal'd with the Seals of the said four persons, or him of them that shall be present.

And that the said Keeper, every day before night, deliver to one of the said persons the said bag, with the King's Great Seal, so seal'd, and on the morrow receive it again, and use it again in manner and form afore-said.

And over this, The King will'd and commanded, there and then, that all manner of matters to be examined and discuss'd in his Court of Chancery, should be directed and determined according to equity and good conscience, and to the old course and laudable customs of the same Court, so that if in any such matters, any difficulty or question in the law happen to arise, that he therein take the advice of some of the King's Justices, so that

right and justice may be truly ministred to every man.

So also when *Stephen Gardiner*, Bishop of *Winchester*, died, the Queen took the Great Seal into her own custody, and the 2 & 3 *Phil. & Mar.* 13 *Nov.* assign'd only *Sir Nicholas Hare*, Master of the Rolls, to *hear and determine* all matters and causes in Chancery, and to do and execute all manner of causes and matters of justice in the said Court, after the course of the Chancery, in like manner *as the Chancellor of England for the time being should or ought to do.*

So upon the death of *Sir Christopher Hatton*, Lord Chancellor, the Queen granted a commission to the Lord Treasurer and others, for the custody and use of the Seal, and granted another commission to *Sir Gilbert Gerard*, the Master of the Rolls, and others, for hearing and determining matters and causes in Chancery.

So upon the death of *Sir John Puckering*, *Sir Thomas Egerton*, the Master of the Rolls, was made Lord Keeper, and retain'd both offices for several years. He *had as many and great avocations as other* Chancellors; his *absence* was no more supply'd by *special commissions* than *before or since*, and yet there was then no Master of the Rolls, to whom the suitors might resort in his absence for dispatch of business.----- It cou'd not then be thought to be the constitution of the court

of Chancery, that there were to be *two Judges* in it, the Chancellor *supreme*, and the Master of the Rolls the *subordinate* one; if it had been so, then by the Keeper's being also Master of the Rolls, the constitution of the Court was broke; there was then but one Judge, for one man cannot be *both* a supreme and a subordinate Judge, and the *fancied policy* of the law in molding the court of Chancery, was *intirely* defeated.

But there is a more modern instance of the like nature, in the late Lords Commissioners of the Great Seal, when the Earl of *Macclesfield* parted with the Seals, they were delivered to Sir *Joseph Jekyl*, Master of the Rolls, and two Judges; the Master of the Rolls became thereby, with the others, the supreme Judge, and in the common way of thinking cou'd not be the subordinate one too.

In all these instances, what became of the Author's suppos'd *wise* constitution of the court, or *policy* of the law, in constituting two Judges in the Court of Chancery, the Chancellor supreme, and the Master of the Rolls subordinate? Where was the Author's *divided business* of the Court, and the sitting of two Judges by *turns*, at *different places*, to dispatch it? And what became of the causes of the suitors, whose delays, without a *subordinate* or *second Judge*, we are told would be intolerable? Again, If this was the constitution of the

the court, then all these Patents from the Crown, and more that may be enumerated, were so many *breaches* of the law and constitution, or rather *subversion* of them; for the having but *one Judge* instead of *two*, and the making the same person both the *supreme* and *subordinate* Judge, is an entire change and destruction of the said suppos'd constitution; and therefore it is more reasonable to imagine that by the *policy* and *constitution* of the court, the Master of the Rolls is no Judge, but only a Minister or Officer.

Another reason to shew that the Master or Keeper of the Rolls is no Judge of the court, may be collected from the several other ministerial offices and employments executed by him, in the court, besides the mere custody of Rolls and Records.

1. He is Clerk of the ^p Petty-bag, and, as Sir ^q John Pettus writes, whenever the King's Warrant to issue out Writs for Parliament, is sent to the Lord Chancellor, *his Lordship either sends it, or a like Warrant, to the Master of the Rolls, who as chief Clerk of the Petty-bag, causeth the other Clerks of the office to ingross the Writs.*

He is also by the constitution of the Court one of the ^u writers to the Great Seal, and formerly

H 2

merly

^p 4 Inst. 97. Sir John Pettus Constitution of Parliament, 325.

^q Ibid.

^u Imprimis, Cum ab antiquo ordinatum fuit quod Custos Rotulor' Cancellariæ prædictæ pro tempore existens haberet

merly had only *three Clerks*, like the other Masters, *to write under him, in his name*, till by the Ordinances of R. 2. his Clerks *were increased to six*, from whence came the six Clerks, who, together with three Clerks of the Petty-bag, wrote in the Master of the Rolls's name, as ^w Mr. Croke, in the MS. cited by the Author of the Discourse, relates ;
 " In the old Orders of the Chancery, says he,
 " it is found that these *necessary officers and mi-*
 " *nisters* have been admitted to write to the
 " Seal, *viz.* the Clerk of the Crown, the
 " Prothonotary, the twelve Masters, in which
 " number *the Master of the Rolls is one*, and
 " the Prothonotary is another.

The said six Clerks and Clerks of the Petty-bag wrote Patents, Writs and Processes, of divers kinds, (too tedious here to be enumerated) under and in the name of the Master of the Rolls, to whom Fees were anciently, and still are paid, as being written by his Clerks, a * few of which, for example,

tres Clericos subscribentes in eisdem Rotulis, & non plures (pro eo tamen quod negotia in dictis Rotulis inferenda indies confluent multo magis quam solebant) Ordinatum est, quod idem Custos jam habeat Sex Clericos, & non plures, scribentes in Rotulis prædictis, ex causa prædicta.

^w Croke's MS. Ibid. p. 15.

* Fees of Writs, &c. payable to the Master of the Rolls, as Chief Clerk of the Petty-bag. l. s. d.

Brev' de Venire facias,	_____	_____	0 6 8
Pro Cancellatione Recogn' pacis,	_____	_____	0 6 8
Melius Inquirend',	_____	_____	0 6 8
Pro quolibet judicio,	_____	_____	0 6 8
Pro Exemplificatione,	_____	_____	0 2 0
Pro Constat'	_____	_____	0 6 8
For a Patent for a Sheriff.	_____	_____	0 2 0

are

are taken from the said MS. of Mr. Croke, and inserted in the Margin.

The Master of the Rolls was also one of those who * *plied* Writs to the Great Seal, *i. e.* examined them, and *plied* or *folded* them up to be ready for the Great Seal, to be put to them.

He likewise was appointed by the Chancellor to ² swear the Clerks serving under the Clerks of the first and second Form, and the Curfitors. He also attended to swear the Judges, at their creation in *Westminster Hall*. The Lord ^a chief Justice *Fortescue* gives us this account of the creation of a Judge in his time, *viz. When the King ordains a Justice by his Letters Patents, the Chancellor shall enter the Court where the Justice is wanting, and cause the Serjeant elect to be brought in, the Letters Patents to be read, and notify the King's*

* Item, Quod quilibet prædictorum duodecim Clericorum ad robas, haberet *tres Clericos* ad magis, hujusmodi conditionis, scilicet non uxoratos, manibus suis propriis scribentes, sub nomine magistri sui ad sigillum Domini Regis in Cancellar' prædicta. Et quod nullus eorundem duodecim * *plicet* brevia communiter ad sigillum prædict' præter præfatum Custodem Rotulorum & Præceptores per dictum Cancellar' nominand' & præficiend'. 2 & 7 Art. of the Ordinances of R. 2.

² Item quod omnes præd' Clerici prædictorum Clericorum de prima & secunda forma, ac etiam illorum Curfitarum, qui ad habend' Clericos licentiati fuerunt, *Coram præfato Custode Rotulorum, & uno Præceptor' vel Examiner' jurent'* quod ipsi omnia & singula brevia, sub nominibus Magistrorum suorum faciend' manibus suis propriis scribant'. 24 Art. de Ord. de R. 2.

^a Fortescue de Laudibus Legum Angl. c. 51.

pleasure, touching the office of Justice then void, which done, the Master of the Rolls shall read before the same elect person, the Oath that he shall take, which when he hath sworn, the Lord Chancellor shall deliver to him the King's Letters Patents.

Let the Reader judge for himself whether a person deputed to all these ministerial acts and services, could possibly be a Judge in the highest court of justice amongst us.

I shall now proceed to consider the Master of the Rolls in his other office or capacity, as one of the Masters of the Court of Chancery.

That he is one of the twelve Masters of Chancery, the *first* and the *chief*, needs no proof; every one knows it, and the Author admits it to be so, p. 19, 20.

And tho' he *doth* not as Master or Keeper of the Rolls, exercise any judicial act in the court, yet he doth as Master in Chancery, and, like the other Masters, acts by delegation from the Chancellor; and in his judicial acts, is, as they are, subject to the restraint and direction of the Chancellor: And this will appear by what follows.

An Act of Parliament was made, the 18 E. 3. to establish the Oath of the Masters or Clerks of Chancery, and of the Clerks of course, *i. e.* the Cursitors.

This Act doth not oblige the Master or Keeper of the Rolls, by that name, to take
the

the Oath, but only obliges the Clerks or Masters of the Chancery to take them: *But yet the Master of the Rolls knowing himself to be one of those Clerks in Chancery, hath ever since the making of that Act taken that Oath as a Clerk, and takes no other Oath of Office. The Oath is,*

Ye shall swear that well and truly ye shall serve our Lord the King and his people, in the office of Clerk of the Chancery, to which ye be attitled: And ye shall not assent nor procure the King's disherison, or damage to your power; nor ye shall do, nor procure to be done, any fraud to any man's wrong, nor any thing that toucheth the keeping of the Seal: And ye shall lawfully counsail, in the things that toucheth the King, when ye shall be thereto required, and the counsel which ye know touching him, ye shall keep secret; and if you know the King's disherison or perpetual damage, or fraud, to be done upon things which touch the keeping of the Seal, ye shall put your lawful power to redress the same; and if you cannot the same do, then ye shall certify the Chancellor or other, which may do the same to be amended to your intent.

A Clerk of the Chancery, and a Judge of the Chancery, are in common understanding two different things; Oaths of Office explain the nature of the Office. The Oath here is to serve the King and his people in

the Office of Clerk of the Chancery, not of a Judge of the Chancery.

Besides also, at the end of the Oath there is contain'd, that if he knows any thing done to the disherison or damage of the King, relating to the Great Seal, that he shall put his power to amend it, and if he cannot so do, then he shall certify it to the Chancellor or others, which may do the same.

It is observable, that in the ancient Oaths of the Judges in *Westminster Hall*, if they know any disherison of the King, they are to give him notice of it; but in the Oaths of the Officers of the Court, they are to give the Judge of the Court notice.

Thus in the Oath of a Justice or Judge appointed by the 18 E. 3. Stat. 4. it is, that he shall not know of the damage or disherison of the King, whereof he shall not cause him to be warn'd by himself or others.

So the Oath of Chancellor is, *Ye shall not know or suffer the disherison of the King, nor that the rights of the Crown be decreas'd as far forth as you may let it; and if ye may not let it, ye shall make it clearly and be expressly known to the King, with your true advice and counsel to the King, in all that you may.*

But in the Oaths of the Officers of the Courts, they are to give their respective Judges notice of it, as the Oath of a Prothonotary in the Common Pleas, is to do no
4 *falsehood*

falsehood nor deceit within this place, nor to consent to none, and if he knows of any done by any other person within this place, to give notice to the King's Justices of this place, or to some of them. Rast. Intr. 442. b.

The Oath above-mentioned, taken by the Master of the Rolls, upon his admission to be a Clerk in Chancery, is the same that is taken by the other eleven Clerks or Masters in Chancery on their respective admissions, and both *he* and *they* are by this Oath equally to *certify* any damage relating to the Crown, which they cannot prevent *to the Chancellor*; or other who may amend it.

Is there any difference here between him and the other eleven Masters? Is not he one of the Clerks as well as they? Do not he and they take the same Oath of a Clerk of the Court? And can he any more than they be both the Judge and Clerk of the Court?

Whatever the Author may now think, it hath been the opinion of all times, that the Master of the Rolls is as the other Masters in Chancery; the number of twelve Masters would not be compleat without him: *He* is, with the *Masters*, of the Chancellor's *council*; an *assistant* to him, as hath been shewn in the preceding chapter.

In the Ordinances of the 12 R. 2. he and the other Masters act, and are join'd together under

under the general name of the 'twelve Clerks of the first form.

Among the Chancery Parchments in the Tower, of the reign of *H. 4.* the King commands the Keeper of the Hanaper to pay to *Simon Gainstead*, Keeper of the Rolls, the usual allowances, *pro seipso ac socijs suis Clericis, for himself and his fellow Clerks*; and in the first year of *H. 6.* there is another Writ or Command from the King, of the like kind, *Rot. Pat. 1. H. 6.*

I may venture here to cite the opinion of Masters in Chancery a hundred years ago, when there was no dispute or uneasiness between them and the Master of the Rolls, and when what they then affirm'd doth not appear to have been denied by any one at that time.

In the before-cited MS. containing a defence of the Masters of Chancery, of the precedence allow'd them before the Serjeants, they not only bring positive arguments to establish their precedence, but also answer the objections made by the Serjeants to the contrary.

One objection was, that the late usage and custom was to the contrary: To that the Masters say, *If by the ignorance of Officers,*

* *Ordinatum est per Dom' Cancellarium Angliæ, ac per duodecim Clericos de prima forma ad robas, in Cancellar' Dom' Regis Concordatum—— Art. the 2d, —— Nullus eorundem duodecim,—plicet breviam—præter Custodem Rotulor' &c.*

negligence of Masters, and ambition of the Serjeants, some wrong hath been done of late years, there is no time past to be restor'd; yet hath it not been so wholly neglected as is suggested: And one of the number of the twelve Masters hath continually held his place meet for his calling; doth not the Master of the Rolls, who hath no warrant to sit next unto the Lord Chancellor upon the high bench, but that he is primus de prædicto numero duodeno; nor hath any jurisdiction there, but as a Master of the Chancery holds his place wheresoever he be, between the Lord Chief Justice of the King's Bench, and Lord Chief Justice of the Common Pleas, and above all the rest of the Judges and Barons? Yet was he not anciently term'd but Clericus, as we were, and for his jurisdiction was but as we. If he be but as one of us, (tho' the chief) it may be easily discern'd what place his fellows in place ought to hold. We hope there will not be any so absurd as to hold, that in respect of his keeping of the Rolls of the Court, he should sit so high, for then the Custos Hanaperij who keepeth the King's Treasure there, the Custos Recordorum & Brevium in the King's other Courts might challenge to set themselves by the Judges there.

But besides all this, there remain sufficient monuments in the court to shew that by the constitution of the court the Master of the Rolls is no other than another Master, and
that

that by authority and power from the Chancellor, he did judicial acts in the same manner as other Masters did, and no otherwise, and was ordered and directed by the Chancellor to this or that part of the business of the court, as the Chancellor thought most expedient and proper.

Those matters which by modern usage are now only committed to the eleven Masters, were heretofore promiscuously and in like manner committed to the Master of the Rolls, sometimes to him *alone*, and sometimes to *him* and *other Masters*.

The perusal and consideration of ^b Interrogatories whereon persons were to be examin'd, referr'd to Sir *William Cordell*, Master of the Rolls.

In like manner, the settling of ^c Interrogatories whereon persons were to be examin'd, referr'd to Sir *Gilbert Gerrard*, Master of the Rolls.

The ^d consideration of Witnesses taken *ad informand' conscientiam*, referr'd to the Master of the Rolls, to be by him perus'd and consider'd, whereon such further order should be taken, as to the court should seem meet.

By ^e order of the Lord Chancellor, a person examined upon Interrogatories by Sir *Robert Southwell*, Master of the Rolls.

^b *Hole & al' v. Banister & al' Trin. 9 Eliz. Regist. 154. b.*

^c *Amies v. Matthew & al' Trin. 23 Eliz. Reg. 535. a.*

^d *Ringrose v. Billing, Mich. 10 Eliz. Reg. 332. a.*

^e *Post Term' Mich. 37 H. 8. Reg. 22. a.*

The Master of the Rolls ^f ordered to consider of the Defendant's title to the land in variance, and if it should appear that the Defendant had a title, but mistook in setting out the same in his answer, that then on report thereof the court wou'd give liberty to the Defendant to put in a new answer.

The ^g consideration of a common recovery, whether it was between the same persons as were Parties to a suit in Chancery, referr'd to Sir *William Cordell*, Master of the Rolls, and Mr. *Huyck* a Master.

The court referr'd to the Master of the Rolls the ^h consideration of the cases on both sides, exhibited to inform the court whether the said cases did agree or not, whereon he made *his Report*.

Referr'd to the Master of the Rolls, and Sir *Richard Rede*, a Master, to ⁱ consider whether certain Bonds and Assurances were good and sufficient, whereon a *report* was made by the Master of the Rolls.

Referr'd to Sir *William Cordell*, Master of the Rolls, to ^k consider whether the Defendants had confess'd by their answer, the having of the Will demanded by the Plaintiff, or of any other Will, whereon he made his *Report*. The

^f *Goure v. Ingram* & *Ux* Pas. 6 *Eliz.* Reg. 169. *a.*

^g *Joanes v. Griffith*, Mich. 16 & 17 *Eliz.* Reg. 47. *b.* Ibid. 183. *b.* 218. *a.*

^h *The Mayor, Jurats and Commonalty of Feversham*, *v. Parker*, Hill. 17 *Eliz.* Reg. 133. *a.*

ⁱ *Leigh v. Done* & al' Pas. 17 *Eliz.* Reg. 218. *a.* & *ibid.* 249. *a.*

^k *Wishkins v. Fincham*, 7 *Maij* 21 *Eliz.* Reg. 96. *b.* & 21 *Eliz.* Reg. 112. *b.*

The court ¹ ordered money to be deliver'd to the Master of the Rolls for safe custody— And after the death of Sir *William Cordell*, Master of the Rolls, there are ^m orders of court upon his Executors, to pay money out of court that had been receiv'd in by him.

ⁿ Deeds and Writings ordered by the court to be brought before the Master of the Rolls, and to be kept by him till farther order.

Sir *William Cordell*, Master of the Rolls^o, appointed by order of court to speak with Mr. *Kellarway* about the special points that moved him to make a Certificate into the court, concerning the matter then in question, the Master of the Rolls accordingly talked with Mr. *Kellarway*, and made his *Report* thereon.

The ^p insufficiency of answers referr'd to the Master of the Rolls.

The

¹ *Bowser v. Webb*, Mich. 22 & 23 *Eliz.* Reg. 79. *a.*
Knowles v. Fettiplace, eodem Term' Reg. 112. *a.*

^m Mich. 23 & 24 *Eliz.* Reg. 275. *a.* & Mich. 25 & 26 *Eliz.* Reg. 139.

ⁿ *Vaughan v. Parry*, 8 *Maij*, 4 *E. 6.* Reg. 215. *a.* *Duke of Suffolk & Ux' v. Bartie*, & al' Reg. 6 & 7 *E. 6.* 140. *b.*

^o *Young v. Young*, Pas. 14 *Eliz.* Reg. 233. *a.*

^p *Blunt v. Robinson.*

P. 817. Ordered by the right honourable the Lord Keeper, that the Council on both parts shall attend the right worshipful the Master of the Rolls, with the bill and answer, to the end he may consider whether the Defendant's said answer be sufficient or not, if not, then wherein it is insufficient, and then this court will give further order, &c.

The Master of the Rolls, Sir *Nicholas Hare*, ^a ordered by the Lord Chancellor to tax costs. The like to Sir ^r *Gilbert Gerrard* and Sir ^r *Thomas Egerton*.

A ^r Bill referr'd for scandal to Sir *Gilbert Gerrard*, Master of the Rolls, and Master Dr. *Forth*, one of the Masters, who made their report thereon, and judgment given by the court on such report.

The Parties ordered to attend the Master of the Rolls, to ^u strike a Jury.

The Master of the Rolls is ordered to ^w peruse the Evidences of the Matters in question, and that so many of them as he should perceive to appertain to the Plaintiff, should be shew'd to the Plaintiff's council; and that the Master of the Rolls should report to the Lord Chancellor the whole matter, that

Hovenden v. the Mayor, &c. of Canterbury, Reg. 24 & 25 *Eliz.* p. 143. *Palfriman v. Adams*, Reg. 36 & 37 *Eliz.* 54. *b.* *Belson v. Sipson*, 10 Nov. 24 & 25 *Eliz.* Reg. 101. *a.*

^q And it is further order'd, adjudg'd and decreed, that the said Plaintiff shall pay unto the Defendant, the costs and charges by him sustain'd in his said suit, as well in this Court as at the Common Law, at the taxation and appointment of Sir *Nicholas Hare*, Knt. Master of the Rolls. *Parot v. Edgebuston*, Hill. 1 *Mur.* Reg. 97. *b.*

^r Reg. 24 & 25 *Eliz.* *Livers v. Braud*, p. 530.

^r *Fisher v. Steward*, 6 *Maij* Reg. 36 & 37 *Eliz.* p. 8, 9. *ibid.* 127.

^r *Steward v. Fanshaw*, 12 *June* 34 *Eliz.* Reg. 658.

^u Hil. 15 *Eliz.* Reg. 147. *b.*

^w *Lord Mordant v. Ogden*, 28 Nov. 2 *Mar.* Reg. 275. *b.*

there-

thereupon farther order might be taken as appertaineth.

By these instances, and more that might be collected, it appears, that the Chancellor did *order* and *employ* the Master of the Rolls about the business of the Court, in the like and same manner as he did the other Masters; and if he had not so *done*, he had had in effect but *eleven Masters*. And by these instances it also appears, that the authority and power by which the Master of the Rolls did those judicial acts, was by *communication* or *delegation from the Chancellor*.

But the most *remarkable delegation* of power from the *Chancellor* to the Master of the Rolls, is yet behind, and that is the committing or referring the hearing and determining of causes to the Master of the Rolls, and to make his Report just in the same manner as in the former chapter is related to have been done to the other Masters.

This shews the *rise* and *occasion* of hearing causes by the Master of the Rolls, and at the same time shews that he had no power to hear them *virtute officij*, or as part of his office; for if he had had such a *right*, it had been a very strange thing either for the Chancellor to command him to *hear* a cause, or for him to *obey* it.

The Author whom I have so often mention'd, saith in p. 12. that *in order to examine*
the

the matter to the bottom, he hath made as full a search into the Register Books, as the great number of those large Volumes would admit, or indeed was necessary; and it appears by his Discourse, that he hath thoroughly perus'd them, which makes me very much surpriz'd at his assertion in p. 124. if I do not mistake him; That there is not the least footsteps of any delegation from the Chancellor to the Master of the Rolls, to hear a cause, to be found amongst the Memorials of the Court: And that I may not mistake him, I shall transcribe his own words, p. 124. —

Is it suppos'd, that there was a particular delegation from the Chancellor to the Master of the Rolls, to hear each Cause? If that was the case, some such order, some act of delegation wou'd appear; but there is not the least footstep of any thing of that kind to be found amongst all the Memorials of the Court.

I must again say, that I am very much surpriz'd at this assertion, because the instances and orders of this kind in the Registers of the Court are so *very numerous*, that it is hardly possible for the most negligent reader to escape or overlook them.

There are hundreds of* this kind to be found
in

* *Fuljambe v. Frechwell.*

The matters between the said Parties is committed to the Master of the Rolls, and to Mr. Oliver, to be heard, and they
I to

in the Registers of the Court; some are transcribed *verbatim* in the margin, and many more

to make report to my Lord Chancellor on Thursday next.
Die Sabbati 4 Feb. 1 E. 6. Reg. 72. b.

Reade v. Bury.

Materia inter eos committitur Magistro Rotulor' & Doctari Bellasis audienda 3 May, 2 E. 6. Reg. 123. a.

Lamb v. Burton.

The matter between the said Parties is committed to the Master of the Rolls, and to Mr. Oliver, to be heard, and they to make report. 19 June 2 E. 6. Reg. 166. b.

Allen v. Pell.

It is order'd, that the matter shall be heard before the Master of the Rolls, and Master Dr. Lieson, and they to make report to this Court. 8 Nov. 2 E. 6. Reg. 200. b.

Day v. Foscroft.

This matter is appointed to be heard on Friday in the afternoon by the Master of the Rolls, and Master Dr. Oliver, Die Mercurij 14 Nov. 2 E. 6. Reg. 213. b.

Hege v. Potter.

This matter is appointed to be heard on Saturday in the afternoon by the Master of the Rolls, and Master Dr. Bellasis, *ibidem*.

Pennington v. Salter.

Materia illa committitur Magistro Rotulor' & Magistro Oliver audiend' & faciend' Relation' inde. 30 Jan. 2 E. 6. Reg. 258. b.

Simonds v. Simonds.

The Defendant is commanded by the Lord Chancellor to be here on Wednesday next at his peril, and then the matter is appointed to be heard by the Master of the Rolls, and by Dr. Standish. 31 Jan. 2 E. 6. 260. a.

Turpey v. Dennis.

This matter is compromitted to the final order and determination

more might be added. The reader will, by what is transcribed, see, that the Chancellor did

mination of Sir Robert Bows, Kn^t. Master of the Rolls, and Sir Richard Reade, Kn^t. Reg. 6 & 7 E. 6. 78. b.

Calin v. Wood.

This matter is appointed to be heard on the 22d day of Feb. next, before Sir Robert Bows, Kn^t. Master of the Rolls, Sir Richard Read, Kn^t. and Richard Lyell, Doctor in Law, or before two of them, at the Rolls; and the said Parties are commanded to have their Counsel in readiness at the said day, for the hearing of the said matter. Reg. 6 & 7 E. 6. p. 84. b.

Frayford v. Frayford.

This matter is appointed to be heard by the Master of the Rolls, on Friday next in the afternoon. 14 Nov. 2 E. 6. Reg. 213. a.

Nichol & Fremond.

Publication is granted upon Friday next, and the matter is appointed to be heard, by the Master of the Rolls, on Saturday next. Die Mercurij 14 Nov. 2 E. 6. Reg. 213. b.

Chilcot & Moor.

Materia inter eos audietur cras post meridiem coram Magistro Rotulorum. 30 Jan. 2 E. 6. Reg. 256. b.

Cupper v. Christopherson.

Materia inter eos committitur Magistro Rotulor' audiend' & faciend' Relationem inde Domino Cancellario. 9 Feb. 2 E. 6. 282. a.

Gardiner v. Shelton.

Materia inter eos audietur cras post meridiem in Aedibus Magistri Rotulor'. 16 Nov. 1 E. 6. Reg. 35. b.

Syger v. Dupell.

Materia inter eos audietur cras post meridiem coram Magistro Rotulorum. Ibidem, 36. b.

did frequently referr the *hearing* and *determining* of Causes to the Master of the Rolls
alone,

Squire v. Aston.

The matter between the said Parties is committed to the Master of the Rolls, and Mr. *Leyson*, to be heard, and make report to my Lord Chancellor. *Ib.* 86. *a.*

Parry v. White.

The matter is committed to the hearing of the Master of the Rolls, and he to report the same on Wednesday next, 3 E. 6. *Reg.* 55. *a.*

Langston v. Brent.

This matter is committed to the hearing of the Master of the Rolls, and he to make report thereof on Monday next. *Ibidem*, 58. *b.*

Knight v. Kirke.

This matter is committed to the Master of the Rolls, and to Mr. *Hussey*, to be heard before them on Saturday, and report thereof to the Lord Chancellor on Monday next. *Ibidem*, 60. *b.*

Draper v. Pinnel.

This matter is committed to the hearing of the Master of the Rolls. *Reg.* 3 E. 6. 102. *a.*

Lee & Pope.

This matter is committed to be heard by the Master of the Rolls, and he to make report thereof to the Lord Chancellor to morrow. *Ibidem*, 109. *a.*

Needham v. Williams.

This matter is committed to the Master of the Rolls, and he to take an order between the said Parties if he can, if not, to make report to the Lord Chancellor. *Ib.* 115. *b.*

Apesley v. Hamlyn.

This matter is committed to the hearing of the Master of the Rolls, and he to make report thereof to the Lord Chancellor. 3 & 4 E. 6. *Reg.* 176. *a.*

alone, and oftentimes conjunctly to the Master of the Rolls, and another Master or Masters:
That

Dunne v. Fielding.

Materia inter eos committitur Magistro Rotulor' & Magistro Reade apud Rolles cras post meridiem audiend'. 4 E. 6. Reg. 212. a.

Reeling v. Chalfont.

Materia inter eos committitur Magistro Rotulor' & Magistro Oliver, apud le Rolles die Veneris prox. audiend. Ibidem, 212. a.

Lawrence v. Herle.

It is order'd by this Court, that the Attorney of the Defendant shall give in commandment to the Defendant, that he appear before the Master of the Rolls this afternoon at the Rolls, for the hearing the matter between the said Parties. 4 E. 6. Reg. 265. a.

Brome v. Gatton.

This matter is appointed to be heard at the Rolls this afternoon. *Ibidem*, 265. a.

Thilet v. Broke.

Publication is granted between the said Parties, by assent of the said Parties, and the matter between the said Parties is appointed to be heard on Friday next in the forenoon, if the Lord Keeper shall sit in Court, or else the same matter to be heard in the Rolls, in the afternoon of the same day, before the Master of the Rolls. 3 Eliz. Reg. 11. a.

East v. Clerk.

Upon the hearing and debating the matter in variance, for and concerning a Tenement with the appurtenances, and certain lands in *Bested* within the County of *Suffolk*, before Sir *William Cordell*, Kn^t. Master of the Rolls, and upon his report made this day unto the Lord Keeper of the Great Seal of his opinion, concerning the right of the same matter, it is order'd, &c. 3 Eliz. Reg. 226.

Leicester v. Erbury & al.

Whereas in *Hillary* Term last the Lord Chancellor committed the hearing of this Cause to the late Master of the

That these References were made just in the same manner, as References of the like nature

Rolls, who, for that he was then so sick, could not hear it; and now being deceased, the Plaintiff made humble suit, that the matter might be committed to the hearing of Sir *Gilbert Gerrard*, now Master of the Rolls; therefore the matter is, by the said Lord Chancellor, referr'd to the said Master of the Rolls, he to hear the same, at such time as he shall think meet, 23 *Eliz. Reg.* 501. *a.*

Cross v. Madges.
The matter between the said Parties is committed to the hearing and order of the Master of the Rolls, and Mr. Dr. *Huick*, and a Writ of Subpœna is awarded to the Defendant to hear Judgment immediately. 3 *Eliz. Reg.* 110. *a.*

Rogers & al. v. Mytherden & al.
It is order'd, that the Bill and Answer of the Parties exhibited in this Court, be referr'd to the consideration of the Master of the Rolls, and Sir *Richard Rede*, Kn^t. and thereupon, according to their information and report, further order is to be taken, as this Court shall seem meet, 3 *Eliz. Reg.* 1. *a.*

Goodwich v. Crimes.
Memorandum, it is order'd by the Lord Keeper of the Great Seal of *England*, that the matter in controversy between the said Parties shall be reported by Sir *William Cardell*, Kn^t. Master of the Rolls, Mr. Dr. *Huick*, and Mr. *Vaughan*, Masters of the Court of Chancery, unto whom the examination of the same Cause was heretofore committed, on Monday before the beginning of the next Term of *St. Hillary*. 3 *Eliz. Reg.* 139. *a.*

Griffin v. Leighton.
The matter between the said Parties is appointed to be heard before the Master of the Rolls, on Friday next in the afternoon, at the Rolls. 10 *Eliz. Reg.* p. 2. *b.*

Heydon v. Astwick.
Order'd, that the Master of the Rolls, Sir *Richard Rede*, Kn^t. and Master Dr. *Lewis*, shall examine and consider the matters produced by the Parties; and besides shall consider, whether the Answer put into the Plaintiff's Bill be insufficient or no; and thereupon that they inform the Lord Keeper

ture were made to the other Masters; sometimes appointing a particular *place* for the hearing,

er of the Great Seal, of their doings and opinions, in the premises. 8 *Eliz. Reg.* 407. *a.*

Marmyn v. Biddle.

Whereas this day was given to the Defendant to shew cause to this Court, why an order lately taken before the Master of the Rolls, by assent of the Defendant, should not be performed by him, at which day the Counsel learned being present; it is order'd, that the cause and matter in variance be referr'd and committed to the hearing and determination of the said Master of the Rolls, and of Mr. Dr. Lewis, to be by them ended and determined, between this and Monday next, whose order and end therein, as well the Plaintiff as the Counsel of the Defendant, have in open Court assented that the Parties shall stand unto and perform, which if the Defendant shall refuse to perform, or shall not give his attendance upon the said Master of the Rolls, and Mr. Dr. Lewis, for the hearing and ordering of the said matter, then the Decree heretofore made in this Court, in *Trinity Term*, in the sixth year of the reign of our Sovereign Lady that now is, shall stand in force absolutely, and be executed against the said Defendant. 8 *Eliz. Reg.* 131. *b.*

Marmyon v. Biddle.

Memorandum, both the said Parties are ordered and appointed to wait upon the Master of the Rolls, and Mr. Dr. Lewis, on Friday next, for and concerning the matter depending in variance between them in this Court, before whom if the said Defendant shall not shew good and sufficient cause and matter to the contrary, then the said Defendant shall forthwith return to the *Fleet*, there to remain in execution upon a Decree heretofore made against him, in such sort as he was of late before his delivery, and his enlargement from thence. 8 *Eliz. Reg.* 282. *b.*

Maliwerer v. Wentworth.

The matter in variance between the said Parties, is committed to the hearing, order, and final determination of Sir William Cordell, Kn^t. Master of the Rolls, Mr. Serjeant Wray, and Mr. Attorney General to the Queen's Majesty, who

hearing, either in *Court* or at the *Rolls*, and sometimes a particular *time*, either for the
Hearing

who have authority given them by the said Keeper of the Great Seal of *England*, to call before them, as well both the said Parties, as also one *William Drough*, Citizen of *London*, and every other person or persons whom the matter in question doth touch or concern, and thereupon to make a final end and determination in the whole Cause, according to their wisdoms and discretions, or else to make report to the said Lord Keeper of their doings and proceedings therein, to the intent thereupon such further order may be taken in the matter, as to this Court shall be thought meet. 10 *Eliz. Reg.* 121. a.

Onslow v. Puttenham.

In the matter of variance between the said Parties; forasmuch as Sir *William Cordell*, Kn^t. Master of the *Rolls*, having conferr'd with certain of the Judges, concerning the same, hath this day made report unto the Right Honourable the Lord Keeper of the Great Seal of *England*, that by the opinion and judgment of the said Judges, the said Plaintiff is found damnified; it is therefore order'd, that if the said Defendant do not on the first day of *Easter Term* next, shew unto the same some good and sufficient matter to the contrary, then judgment to be enter'd against him without further demand. 14 *Eliz. Reg.* 196. b.

John & John v. Master and Wardens of Drapers of London.

Upon such matter as was this day alledged on the behalf of the said Defendants, touching the cause in question, it is order'd, that the Master of the *Rolls*, Mr. Dr. *Lewis*, and Mr. Dr. *Yale*, two of the Masters of this Court, shall consider of the Decree heretofore made in this Court, touching the last Will and Testament of one *Thomas Hotuel* deceased, and to inform this Court of their opinions touching the same; and if the said Defendants shall shew any good or sufficient cause, before the said Master of the *Rolls*, Mr. Dr. *Lewis*, and Mr. Dr. *Yale*, why they should not pay unto the Plaintiffs the money by them demanded in their Bill of complaint thereupon, report by them made thereof to this Court, this Court mean-

Hearing or Reporting. That the Masters of the Rolls have made Reports pursuant to such Orders,

meaneth to take further order accordingly. 17 *Eliz. Reg.* 183. b.

Tyldesty v. Warde.

Forasmuch as this Court was this present day informed, on the said Plaintiff's behalf, that the said Defendant doth not, according to an order of the 22d of *April, Anno 20 Regine nunc*, attend upon the Right Worshipful Sir *William Cordell, Kn^t* Master of the Rolls, for the ending and determination of the Cause in variance. *Et. 21 Eliz. Reg. 103. b.*

Price v. ap. Howel & al.

Whereas a report made by the Right Worshipful Sir *William Cordell, Kn^t* Master of the Rolls, Mr. Dr. *Lewis*, and Mr. Dr. *Forth*, two of the Masters of this Court, of an order by them taken, upon the hearing of the matter in variance, by consent of either of the Parties and their Counsel, was delivered this present day to the Right Honourable Sir *Thomas Bromley, Kn^t* Lord Chancellor of England; it is by the said Lord Chancellor, in the presence as well of the said *Price*, one of the Plaintiffs, as of the said Defendants, order'd, first, that according to the said report, the possession of the Parsonage in question from henceforth shall be sequestred into the hands of, *Et. Ibid. 216. a.*

Lingen v. Hayward, Kn^t.

Forasmuch as this Court was this present day informed, that the matter in variance being heretofore referr'd to the late Master of the Rolls, the same (after some pains and travail bestow'd thereon) was almost brought to a good end, which hath not taken effect, by reason of the death of the said Master of the Rolls; it is therefore order'd, upon the motion of Mr. Serjeant *Rhodes* being of the Plaintiff's Counsel, that the same matter be now referr'd to the Right Worshipful Sir *Gilbert Gerrard, Kn^t* Master of the Rolls, in such sort as it was referr'd to the said late Master of the Rolls, to be by him ended and determined, according to his wisdom and discretion. 23 *Eliz. Reg. 536. a.*

Berisford

Orders, and such Reports have been afterwards Decreed by the Court. In all the shapes

Berisford v. Berrisford.

It is this present day order'd, upon the motion of the matter, that both Parties shall forthwith attend upon the Right Worshipful the Master of the Rolls, at such time as his Worship shall appoint, to hear the matter touching the controversy rising upon a bargain, which they entred into for the purchase of certain lands, and thereupon to take order for the perfecting of the assurance and payment of the money, which is to be paid for the same, according to his wisdom and discretion, if he so can; if not, then further order shall be taken therein by this Court. *Reg. 561. b.*

Lingen v. Hayward, Kn^t.

It is this present day order'd, upon the request and petition as well of Mr. *Marriot* of the Plaintiff's Counsel, as also of Mr. *Owen* for the Defendant, that the matter may be heard before the Master of the Rolls, before whom the same was appointed to be heretofore heard, but was not, by reason the Defendant did not then attend; order'd, that the same matter be again appointed to be heard, before the said Master of the Rolls, on Saturday next in the afternoon, for which purpose both Parties are to attend at that time with their Counsel. *Reg. 4. b.*

Wayreman & al. v. Stephens & al.

It is order'd, because the time would not now conveniently serve to hear such Causes as the Defendant's Counsel would alledge for stay of the said injunction, that the Defendant's said Counsel shall attend upon the Right Worshipful the Master of the Rolls, to shew his said Causes, at which time the said Plaintiff's Counsel are also to be present; and thereupon the said Master of the Rolls is, upon the hearing of both Parties, to give such order, either for the stay or granting of the said injunction, as he shall think convenient. *Reg. 260. b.*

Bowser v. Webb.

It was therefore order'd, as well that one debt of 300*l.* mentioned in the said (*i. e.* a former) order, to be that day payable to the said *William Webb*; as also all other his debts, as they shou'd grow due, shou'd be delivered into the safe keeping, either of the Master of the Rolls, or of Mr. Dr. *Drewry,*

shapes that possibly can be imagined, *Instances* are found of the Chancellor's *Referring Causes* to

Drewry, before whom the said Will is in question, as by the same order more at large appeareth, Forasmuch as the said Mr. *Drewry* hath certified under his hand, &c. it is therefore, upon the motion of the Defendants, order'd, that the said 300 l. being delivered to the hands of the said Master of the Rolls, shall be delivered to the said Mr. *Drewry*; and this order shall be a sufficient Warrant and Discharge for the said Master of the Rolls, in that behalf, &c. 22 & 23 *Eliz. Reg. 79. a.*

Finense v. Rolfe.

Upon the full hearing of the matter in variance between the said Parties, for that the Master of the Rolls cou'd not persuade them to agreement, he mindeth to make Report to the Right Honourable the Lord Keeper. 13 *Eliz. Reg. 315. b.*

Onslowe v. Puttenham.

In the matter in variance between the said Parties; forasmuch as Sir *William Cordell*, Kn^t. Master of the Rolls, having conferr'd with certain of the Judges concerning the same, hath this day made report unto the Right Honourable the Lord Keeper of the Great Seal of *England*, that by the opinion and judgment of the said Judges, the said Plaintiff is found damnified; it is therefore order'd, if the said Defendant do not on the first day of *Easter Term* next, shew some good and sufficient matter to the contrary, then judgment to be entred against him without farther demand. 14 *Eliz. Reg. 196. b.*

Finch v. Low.

Whereas before this time the examination and hearing of the Cause in controversy between the said Parties was committed to the Master of the Rolls, who hath not hitherto heard and ordered the same Cause, by reason the Defendant hath not given his attendance for the hearing thereof; it is order'd, that a Writ of Subpœna be awarded against the said Defendant to hear judgment in *Easter Term* next; at which time both Parties are appointed to wait upon the Master of the Rolls, for the hearing and ordering the matter. *Hill. 8 Eliz. Reg. 3. a.*

to the Master of the Rolls to be *heard* and *determined*, and of the Master of the Rolls *hearing*.

Carey & ux. v. Goughly, Walker & al.

Forasmuch as this Court is informed by Sir *William Cordell*, Master of the Rolls, and Mr. Dr. *Huyck*, to whose hearing, ordering, and determination, the Cause and matter in variance, between the said Parties, was, by their assents, committed and referr'd; that upon the examination and debating of the whole Cause, and the consideration of the witnesses produced on both sides, a Release, which the Plaintiffs alledged in their Bills to have been made by the said *Gilbert Walker*, one of the Defendants, in discharge of a Recognizance, or an Estatute of the Staple of the sum of 500*l.* heretofore acknowledged by one *Bartholomew Linton*, to one *Thomas Walker* deceased, Testator of the said *Gilbert Walker*, appeareth unto them to be sufficiently proved, by good Testimony, to have been made, sealed and delivered by the said *Gilbert*, unto the said *Bartholomew Linton*; and that therefore the said Defendants ought not to take any advantage against the said Plaintiffs, upon the said Recognizance of Estatute of the Staple; it is therefore this day order'd, that the said Recognizance or Estatute, and Process, Extent and Execution thereupon shall cease, and that the said Defendants shall forthwith discharge, make frustrate and void the same. 8 *Eliz. Reg.* 147. b.

Finch v. Low.

Whereas in *Hillary* Term last it was order'd, that both the said Parties should attend upon the Master of the Rolls, for the hearing and ordering of the matter in question, to whom the same was committed, for which purpose Process of Subpoena was granted against the said Defendant, who appeared not thereupon; whereupon it was on the 6th of *May* last order'd, that if the said Defendant did not appear before the said Master of the Rolls, by Wednesday was seven-night, and give his attendance for hearing the said matter, then a former order made in this Court the 11th of *June*, in the fifth year of the Queen's Majesty's reign, that now is, should stand in force, and be executed against the said Defendant. Forasmuch as the said Defendant hath not appeared, nor given his attendance, as is aforesaid, for the hearing of this matter, but hath absented himself, so as the said Master

hearing and determining accordingly; and tho' no particular instances of this kind should be found before the 36 of *H. 8.* because the Registers of the Court go no higher; yet the first

Master of the Rolls could not proceed to the ordering and determination of the matter, by the default of the Defendant; therefore it is order'd, that a Decree be made against the said Defendant, to satisfy and pay unto the Plaintiff so much money, as is proved in this Court to be due unto him, according to the effect and purport of the said former order. *8 Eliz. Reg.*

Cotton v. Weston.

It is order'd, that the Parties shall attend the Master of the Rolls, to shew Cause, what they can, why the report should not be confirmed. *15 Nov. Mich. 19 & 20 Eliz. Reg. 2. a.* — What was done on the said order, appears by the following order in the same Cause.

Whereas by an order made in this Cause the *15 Nov.* last, all the said Parties were appointed to attend upon the Right Worshipful Sir *William Cordell, Kn^t.* Master of the Rolls, to shew what they could for the maintenance of their titles, in and to the Lease, and other matters in variance between the said Parties: Forasmuch as by the mediation and travail of the said Master of the Rolls, there is an order taken and set down between the said Parties, by their own assent; whereunto, as well the hands of the said Master of the Rolls, as also of all the said Parties, are subscribed; It is therefore this present day ordered, and adjudged, and decreed, that the said Order, taken by the said Master of the Rolls, as aforesaid, be ratified and confirmed by the Decree of this Court. *Ibid. 152. b.*

Beth v. Steward.

29 April, p. 54. b. Ordered, that the matter in variance be referr'd to the hearing of the right worshipful the Master of the Rolls, Master *Dr. Binge*, Master *Dr. Swale*, by friendly means to end the same, and after such hearing of the Cause, or ending the same, to certify to his Lordship: But if they cannot

first special Commission that was granted to the Master of the Rolls, and others, for hearing Causes in Chancery, dated 11 July, 21 H. 8. seems to refer to this custom, as having then obtained; for that Commission is not like the other Commissions that have been since, to hear and determine Causes in Chancery generally, *but only Causes particularly & referr'd and committed to them by the Chancellor.*

This method of committing and referring Causes continued to the time of Sir *Francis Bacon*, who, as it hath been related in the former chapter, to which the reader may have recourse, laid a restraint upon them, and since that time those references have been generally discontinued; and there was the less need of this method, because, as the au-

not make an end, then his Lordship is pleas'd that the point in law be decided by two of the Judges.

Some v. Read.

The right worshipful the Master of the Rolls is required by the right honorable Sir *John Puckeringe*, Knt. Lord Keeper of the Greate Seale of *Englande*, to call the Parties before him, when his leysure shall well serve thereunto: And thereupon to heare, and by all good wayes and meanes to determine, all the controversies depending in this Court betwene the said Parties, by their two severall Billes, according to his wisdom and discretion, if he so can: And all further Proceedings towching the said controversies, or any of them, are to stay in the meane tyme. 37 Eliz. Reg. 578. a.

Per præfat. Dom' Cancellar' vobis seu aliquibus vestrum impositas & commissas ac imposterum imponend' & committend'.

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thor acknowledges p. 86. *from that time special Commissions, to hear Causes in the absence of the Chancellor, have been generally continued till the time of the late Lords Commissioners.*

There is yet an argument of another kind to shew that the judicial power, exercis'd by the Master of the Rolls, is by communication from the Chancellor, in like manner as is that of the other Masters, which is, that the Chancellor hath from time to time *regulated, abridg'd, and restrain'd* the Master of the Rolls, in the exercise of judicial power, as he hath done the other Masters; that which hath been *permitted* to him at one time, hath been by the Chancellor *taken away* from him at another, and *some* judicial authority hath *never been permitted to him at all.*

The Master of the Rolls did formerly, by reference from the Chancellor, determine Pleas and Demurrers, as may be seen from the instances in the ² margin.

² *Sabbati 16. June, Trin. 24 Eliz. Hovenden v. Gaunt & al. Regist. 527. b.*

Upon information made to this Court, on the behalf of the said Plaintiff, that the Defendants have put in a Demurrer to the Bill exhibited by the said Plaintiff, not answering any of the matters contained in the said Bill; and, as is alledg'd, the said Demurrer is very insufficient, and without any good or just cause of Demurrer: It is therefore order'd, that the consideration of the said Bill and Answer be referr'd to the Right Worshipful the Master of the Rolls (Sir Gilbert Gerrard) he to consider of the points of the said Bill, and then to consider of the said Demurrer; and if he find there be no just cause set down for the maintenance of the said Demurrer, that

But the Master of the Rolls doth not at this day hear or determine any Demurrers, they are all determined by the Chancellor only, which comes from the forty fifth Ordinance, publish'd by Sir *Francis Bacon* in the year 1618, whereby it was ordained, *That no Reference upon a Demurrer, or Question touching the jurisdiction of the Court, shall be made to the Masters of the Chancery, but such De-*

that then a Subpœna to be awarded to the Defendant to come to this Court, and to make a perfect and direct answer to the said Plaintiff's Bill.

Idem v. Eosdem Eodem die Regist. 528. a.

Whereas the consideration of the sufficiency or insufficiency of the Demurrer put in by the Defendant to the Plaintiff's Bill of Complaint was this present day referr'd by this Court to the right worshipful the Master of the Rolls, and he to take order therein; Forasmuch as it seem'd to the said Master of the Rolls, upon the hearing both of the Plaintiff's Bill, and the Defendant's Demurrer put into the same, being read by Mr. Serjeant *Puckering*, being of the Plaintiff's Counsel, that the same is very insufficient, and without any just cause therein alledg'd for the maintenance of the same Demurrer: It is therefore order'd by the said Master of the Rolls, that a Subpœna be awarded against the said Defendants, to come to this Court, and to make a good, perfect, and direct answer to the said Plaintiff's Bill of Complaint.

St. Aubin v. Crudge, 17 Ap. 25 Eliz. Reg. 388.

Whereas the right honourable the Lord Chancellor before this time referr'd an Answer or Demurrer put in by some of the Defendants to the Master of the Rolls, to consider if there were sufficient cause shew'd of a Demurrer, who hath accordingly consider'd thereof, and doth order, (for that he finds no sufficient cause of Demurrer) a Subpœna against the Defendant, to compel him to make a perfect and direct Answer to the Plaintiff's Bill. *Simil' Cony v. Ellis. ibid. p. 546. Trin. 24 Eliz. Reg. 527. b. Frost v. Griffith, Hill. 25 Eliz. Reg. 207. a. Ragland v. Bradbridge, Pas. 25 Eliz. Reg. 435. a.*

murrers shall be heard and rul'd in Court by the Lord Chancellor himself.

The fourth Ordinance of Sir Thomas Wriothsley, Chancellor, in the end of the reign of Henry 8. which is entred at the end of the Register of that time, is, *That^a no injunction is to be put to the Seal, to any person, unless my Lord's hand be to the Writ, except the same be granted in open Court by the Master of the Rolls, in the Lord Chancellor's absence, and in that case the said Master of the Rolls to put his hand to the said Writ.*

By this Ordinance the Master of the Rolls could, in a special case, sign a Writ of Injunction, and thereon the Writ might be sealed.

But now the course is otherwise, occasion'd by the forty third Ordinance of Sir Francis Bacon, Anno 1618. which is, *That Injunctions for possession, or stay of suit after Verdict, are to be presented to the Lord Chancellor, together with the Orders, whereupon they go forth, that his Lordship may take consideration of the Orders before he signs them:* Since which time the Master of the Rolls doth not put his hand to any Writ of Injunction; but all Writs of Injunction, together with the Orders whereupon they are made out, are first presented to the Chancellor, that he may sign them before they are put under the Seal.

^a An order for an Injunction vacated, *quia non erat consignat' manu Dom' Cancellarij.* Regist. de 6 & 7 E. 6. 65. a.

By the Ordinances of Sir *Thomas Egerton*, Lord Keeper of the Great Seal, published in the year 1596. and referr'd to by the author in p. 54. *No Writs of Ne Exeat regno, Prohibition—Statute of Northampton, Special certiorari's corpus cum causa or vi laica amovenda shall be made, unless the Lord Keeper, or the Master of the Rolls, being first made privy therewith, shall by writing under the hand of one of them, allow the same to pass.*

By this Ordinance the Master of the Rolls could pass and sign such Writs, but he cannot do so now, because of the restraint laid upon him by the eighty fifth Ordinance of Sir *Francis Bacon*, Anno 1618, by which *these Writs are not to pass without warrant under the Lord Chancellor's hand, and signed by him*; and so is the usage at this day.

Causes which have been set down to be heard at the Rolls, have been order'd by the Chancellor to be heard in Court, as particularly,

The Right Honourable the Lord Viscount *Harcourt*, whilst his Lordship had the custody of the Great Seal, transferred a great number of Causes, which were set down to be heard before the late Sir *John Trevor*, Master of the Rolls, and heard them himself.

As the Chancellor hath regulated and confined the Master of the Rolls, in the exercise of judicial power in the Court, so there is a great part of the judicial business of the Court,

Court, which the Master of the Rolls is not employed in: As, every one knows that a great part of the business of the Court is referr'd to the Masters, who thereon make their reports to the Lord Chancellor only; and if either Party dislikes the report, he may take exceptions thereto; which exceptions are set down to be argued before the Lord Chancellor, and are determined by him, and not by the Master of the Rolls, unless possibly by special direction: The reason whereof is evident, because exceptions are appeals from the Masters Judgment; and if they should be determinable before the Master of the Rolls, it wou'd be an appeal from one Master to another; so that here is a very great and weighty branch of the business of the Court, which the Master of the Rolls is excluded from.

There is yet another proof remaining, to verify and make out, that the Master of the Rolls hath no other judicial authority in him, by the constitution of the Court, than as one of the Masters in Chancery; and this ariseth from the special Commissions from the Crown, that for two hundred years past have been granted to the Master of the Rolls, and others, to hear and determine Causes in Chancery, and their acting under such Commissions.

These Commissions have, ever since the granting of them, been acted under by the Commissioners; the Judges and Masters who have made Orders and Decrees in Chancery, are allow'd by all to have acted under the

authority of these Commissions; the Masters of the Rolls have successively acted with the Judges and Masters the other Commissioners; and it can't, in common understanding, be imagined, but *that the Master of the Rolls acted by the same authority as those did with whom he was joyn'd.*

The first special Commission, as the author saith, p. 59. that was ever granted for hearing Causes in Chancery, ^b bears date 11 July, 21 H. 8. whilst Cardinal *Wolsey* was Lord Chancellor, and is directed to the Master of the Rolls, four Judges, six Masters, and ten others, and reciting, *that the Chancellor was busied about the affairs of the Common Wealth;* and therefore in ease to him, and that justice might be done to the Subjects, the King assigns the said Commissioners, or any four of them, of which, *Two to be of the Master of the Rolls, Judges or Masters,* to hear, examine, and finally to determine all Causes in Chancery, committed to them by the Chancellor, and to do execution thereon.

It is to be observed, that in this Commission the six Masters in Chancery are put on the level with the other Master, the Master of the Rolls, and are, like him, of the *Quorum*; so that under this Commission, a Decree might have been made by the Masters, without the joyning either of the Master of the Rolls, or of the Judges, and which is more, even of the Chancellor himself; for by the

^b Vide Rym. 14. Vol. p. 299.

Commission their *determinations* were *final*, *without the Chancellor's approbation*, which was, in effect, making two Courts of Chancery ; and therefore, that the unity of the Court might be preserved, a *Proviso* was inserted in all the subsequent Commissions, *That all the Judgments and final Decrees of the Commissioners should be signed by the Chancellor, before they should be enroll'd.*

As there doth not appear any other Commission between this and the next extant, *viz.* the 17 *October*, 36 *H. 8.* Anno 1544. So neither doth there appear any Decree made by the Master of the Rolls within that time ; and it is easy enough to conceive, as the business of the Court then stood, that the Chancellor, with the ordinary assistance allowed him by the constitution of the Court, might easily dispatch the whole.

The next special Commission extant is, as is said, dated 17 *Oct.* 36 *H. 8.* and is in *Rymer* Vol. 15. p. 58. It is a Commission to Sir Robert Southwell, *Master of the Rolls*, and to three *Masters*, reciting, that the said Lord *Wriothsley*, then Chancellor, was so continually employed by the King's commandment, about his weighty affairs, that he was not sufficient to dispatch, hear, and determine the Causes depending in Chancery ; and therefore the King being willing, that, *in the absence of the Chancellor*, justice should be done to all his subjects, he assigns the said Master of the Rolls, and three Masters, and

any three or two of them, to examine and determine all matters in Chancery; and that all and singular Judgments, and final Decrees made by them, or any two of them, should be of as great and like value, efficacy, strength and virtue, as if given by the Lord Chancellor and Court of Chancery; Provided, that all such Judgments and Decrees be signed with the hands of three or two of them, *and thereon be presented and delivered to the Chancellor, that the Chancellor may likewise sign them with his hand, before they are inroll'd.*

Can any one think that if Sir Robert Southwell, the then Master of the Rolls, could have made Decrees by himself, by virtue of his office, that there had been any need of a Commission from the King to *enable him so to do*, and much less, that he wou'd have *accepted* of such a Commission as this, wherein there are no other Commissioners besides himself, but three Masters, who are in every instance put on the same foot and level with him? And if consider'd, as the author wou'd have it, as a distinct class of men from the Master of the Rolls, wou'd have had a superiority; because, by this Commission, he cou'd not make a Decree without *one* of the Masters *joyning* with him; but *any two* of the Masters might make a Decree *without him*.

The author saith in p. 116. that the practice of signing and enrolling Decrees began in the 26 *H. 8.* I take it to be a misprint, for, I think, it did not begin till the 36 *H. 8.*

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There was antiently no inrollment of any Decree, in the method now practised; but as every thing then was *short* and *brief*, so the method then was to enter on the back of the Bill, in Latin, the Judgment of the Court, of which there are several instances amongst the bundle of Chancery Parchments in the Tower.

Amongst the MSS. of Sir *Julius Cæsar*, once Master of the Rolls, there is a copy of the entry of a Decree in this manner, dated the 3 July, 31 H. 8. to which these words are subjoyn'd by Sir *Julius Cæsar*. ----- *I find by perusal of the Records of the Chancery remaining in the Rolls, that till 36 H. 8. there was none inrollment of any Decree or Dismission in the Chancery Court, but that upon the Rolls of that year, and so in the former years respectively, the Bills, Answers, Replications, Rejoinders, &c. were filed, and the Decrees or Dismissions written on the backs of the said Bills in Latin, and in form as above-recited, according to the form of Proceedings in the Civil and Canon laws, with some small difference, making only mention of the Proceedings and Pleadings, and not specifying the particular reasons that moved the judgment.*

As the enrolling of Decrees began about this time, so likewise did the signing of the Decrees by the Chancellor, and probably took

¶ Ibid. Vol. 3. 2. N^o 199. penes honorabil' *Carolus Cæsar*.

its rise from the *Proviso* in the last mention'd commission, which from this time came to be the Warrant for enrollment: And this explains the several Entries that from this time are to be met with in the Registers, of Decrees signed by the Chancellor and Master of the Rolls, or by the Chancellor and others, and shew the meaning of them to be, that such Decrees were first made by the Master of the Rolls or others, signing the same, and ratify'd by the Chancellor's testifying his approbation, by his signing, and thereon deliver'd to be enroll'd.

The 18 Feb. 1 E. 6. anno 1546. there was a like^d commission to the same persons, and in the same words, but that commission was declar'd illegal, because the Lord *Wriothsley* pass'd it without a Bill or Warrant from the King to put the Seal to it, and the Seal was soon afterwards taken away from *Wriothsley*, and the 7 March, 1 E. 6. delivered to Lord *St. John*, as Lord Keeper, who continued so to the 23 Oct. 1 E. 6. when *Rich* was made Lord Chancellor.

The next commission extant issued the 9 Oct. 4 E. 6. wherein the King reciting the infirmity of *Rich*, the then Chancellor, *that he cou'd not then dispatch the business of the Chancery, and that an abstinence from business might sooner restore him to health*, and being willing, that in the *absence of the Chancellor*

^d Burnet's 2d Part of the Hist. Reform. Appendix, p. 96.
full

full and speedy justice might be done to all persons, appoints Sir Robert Southwell Master of the Rolls, Portman and Hales two Judges, and six Masters of Chancery, or any three of them, whereof the Master of the Rolls, the two Judges, and Oliver and Croke, two of the Masters, to be one, to hear and determine all matters and causes in Chancery, with the like clauses, as to the efficacy of their Decrees, and their presenting them to the Chancellor to be sign'd, as in the former commissions: But this commission was to determine the last day of *November* then following.

The 26 *Octob.* 5 *E.* 6. there issued another special commission for hearing causes in the absence of the Chancellor, directed to John Beaumont, Master of the Rolls, and others; and Goodrick, Bishop of *Ely*, coming to be Chancellor, another like commission issued, 21 *Jan.* 5 *E.* 6. directed to the Master of the Rolls, two Judges, the Dean of *St. Paul's*, and five Masters, authorizing them, or any three of them, without limiting any *Quorum*, to hear causes in the absence of the Chancellor, and that every Decree shou'd be sign'd by three of them, and presented to the Chancellor, that so on his signing them they might be enroll'd.

The Author saith, in p. 89. that after the said commission of the 21 *Jan.* 5 *E.* 6. there was no commission to hear causes in the ab-

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sence of the Chancellor, till the 5 Nov. 1 Eliz.---- But there are *two commissions* extant in the reign of Queen Mary, and granted in the vacancy of the Chancellorship, ^e the one directed to the Master of the Rolls *only*, and the other to the Master of the Rolls and *two* Masters, to hear and determine matters and causes in Chancery.

Upon the death of the Bishop of Winchester, Lord Chancellor, anno 1555. the King and Queen 13 Nov. 2 & 3 Phil. & Mar. reciting that the office of the Chancellor was void, ^f assign Sir Nicholas Hare, Master of the Rolls, to hear and determine all matters, suits and debates, in Chancery, and to do and execute all matters of justice in the said Court, after the course of Chancery, *in like manner as the Chancellor of England for the time being* might or ought to do. And the King and Queen the 29th of the same Month of November, grant another commission in the like form to the said Sir Nicholas Hare, Master of the Rolls, and to two Masters in Chancery, or to any two of them, whereof the Master of the Rolls to be one.

The 1 Eliz. 5 Nov. the Queen granted a commission in the like form as that of the 4 Ed. 6. to Sir William Cordell, Master of the Rolls, three Masters of Chancery, and

^e Rym. Vol. 15. p. 426.

^f Ibid.

others, or any three of them, to hear and determine matters and causes in Chancery in the absence of the Chancellor; but this commission was not to continue longer than till the 2d of *December* following.

The next commission extant, bears date 4 *Feb.* 5 *Eliz.* and is directed to the Master of the Rolls, two Judges, three Masters, and the Dean of *St. Paul's*, authorizing them, or any three of them, without limiting any *Quorum*, to hear matters and causes in Chancery, in the absence of Sir *Nicholas Bacon*, the Keeper, with the like clauses and proviso's as in the former commissions: but this commission was to be in force till the Queen should *supersede* it, or the Lord Keeper should in full Court determine it.

I do not find that the Queen ever superseded this commission, or that it was ever determined by Sir *Nicholas Bacon*, who lived till the 20 *Feb.* 21 *Eliz.* and was survived somewhat more than two years by Sir *William Cordell*, the Master of the Rolls; on whose death Sir *Gilbert Gerrard* came to be Master of the Rolls.

The next special commission extant, was the 22 *Nov.* 34 *Eliz.* anno 1591. upon the death of Sir *Christopher Hatton*, Lord Chancellor; and this commission was directed to Sir *Gilbert Gerrard*, the Master of the Rolls, and others, for hearing and determining causes in the Court of Chancery, under which
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commission, as appears by the Registers, Sir *Gilbert Gerrard* acted with the other Commissioners, tho' the Registers shew they sometimes disagreed till the 28th of *May* following, when the Great Seal was deliver'd to Sir *John Puckering*, as Lord Keeper.

The two next commissions for hearing of matters and causes in Chancery, are the 35 and 38 *Eliz.* which, as the Author apprehends, *carry along with them not only an affirmation of the judicial power of the Master of the Rolls by the Chancellor, but also by the royal authority, and that by express words:* Whether they do so or no, shall be particularly examined in the next chapter: I only mention them here to carry on the historical succession of commissions as far as they are extant, the last of which commissions continued in force till the death of Queen *Elizabeth*.

The first special commission extant on record in the time of King *James* the first, for hearing causes in Chancery, is the 26 *Oct.* 3 *Jac.* 1. and is directed to the Master of the Rolls, four Judges, and eight Masters in Chancery, or any three of them, whereof the Master of the Rolls, or one of the Judges, to be one.

From this time the Author owns in p. 90. such commissions with a Quorum in the same manner have been generally continued.— And the entries in the Register-Books have for the most

most part been regularly made, wherein he is most certainly in the right, tho' a little before in p. 84. he had made his computation a little lower, viz. from the 3 May, 1617. when a like commission in Sir Francis Bacon's time was granted to Sir Julius Cæsar, Master of the Rolls, and others, from which time the Author there saith, special commissions to bear causes in the absence of the Chancellor, have been generally continued till the time of the late Lords Commissioners, i. e. till about two years ago, and the intermissions of them have been very short, except one after my Lord Bacon, the other after my Lord Somers parted with the Seal.

The account given by the Author of these two intermissions, may possibly induce the Reader to think that there were no commissions at all to the Master of the Rolls, and others, after Lord Bacon and Lord Somers parted with the Seals, till a new Keeper was made; but that is not what the Author saith: All that he saith is, *that during those two intermissions there was no commission to hear causes in the absence of the Chancellor.* This indeed cou'd not be, because there was neither Chancellor nor Keeper in the usual understanding of the word, till King James appointed Dr. Williams, Dean of Westminster, to be successor to Lord Bacon, and King William appointed Sir Nathan Wright to be successor to Lord Somers; but till such appointments

ments were made, there were commissions granted to the Master of the Rolls, and others, to hear and determine causes in Chancery, and the Master of the Rolls and Masters acted under those commissions.

My Lord *Bacon* parted with the Seal the 1 *May* 19 *Jac.* 1. the same day, as the Author himself writes, p. 84. two commissions pass'd, the one for the custody and using of the Seal, the other to the *Master of the Rolls*, and others, or any three of them, to hear and determine causes: Under this the commissioners acted to the 10th of *July* following, when the Great Seal was deliver'd to Dr. *Williams*, and then a new commission issued in the usual form, to the Master of the Rolls, and others, to hear causes in the absence of the Keeper.

My Lord *Somers* parted with the Seal the 27 *April* 12 *Gul.* 3. and thereon there was a cessation of business till the 4th of *May* following, when two commissions pass'd, the one for the custody and use of the Seal, and the other to Sir *John Trevor*, then Master of the Rolls, and others, or any three of them, to hear causes. From the 27th of *April* till after the said commission, Sir *John Trevor* doth not appear by the Books of the Court to have acted in any one instance; but after the commission granted, he and the other commissioners acted under the commission till the 21st day of *May*, when the Great Seal was

was deliver'd to Sir *Nathan Wright*, and the same day a new commission issued to Sir *John Trevor*, the Master of the Rolls, two Judges and Masters of Chancery, in the usual form, to hear and determine causes in the absence of the Keeper.

The Author thus owning that these special commissions to hear causes in the absence of the Chancellor, wherein the *Master of the Rolls* was inserted a commissioner, have been generally continued from the 26 Oct. 1605. or at least from the 3 May, 1617. till the time of the late Lords Commissioners, which is about two years ago. I shall not tire the Reader with a particular enumeration of those subsequent commissions, these are all extant on Record, and may be seen by any one who lists. As for the time backward before 1605. home to the first commission 21 H. 8. there are several commissions extant for a great part of that time, as hath been before shewn, and if commissions do not appear for the residue of that time, it doth not therefore necessarily follow that there were none; some Commissions as well as other Patents and Writings, may have wanted inrollment, and so be lost. 'Tis well known that many Records of Queen *Elizabeth's* Reign, and other times, are wanted; and we all know that many surrenders of Charters in the Reigns of King *Charles* and King *James* the second, were not inroll'd; these commissions pass by

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immediate warrant from the King, and so may have been the more easily slip't, and many other accidents might have happened, which prevented the inrollment of them, or they may be enter'd upon improper Rolls, (as sometimes happens to be the case) and so not easy to be found.

There is room to believe that all the commissions of this kind have not been enroll'd: It doth not appear there was any other commission granted after the commission of the 4 Feb. 5 Eliz. during the life-time of Sir *Nicholas Bacon*, who died 20 Feb. 21 Eliz. and yet it is certain that within that period of time there were Decrees made not warranted by that Commission, as *Pasch. 9 Eliz.* a Decree was made by Sir *Richard Read* and Dr. *Huyck*, two Masters, the latter of whom was not in the said Commission. *Bayford v. Jones, Reg. 107. a.*

The 11 Feb. Hill. 11 Eliz. anno 1568. there is a Decree made by *Read, Harvey, and Huyck*, three Masters, (*Gallant v. Harers, Reg. 376. a.*) the last of whom was not in the said Commission; and another Decree made in the same Term, by *Harvey and Huyck*, two Masters, which *Huyck* was not in the said Commission. *Turner v. Turner, Reg. 273. a.* These Decrees must have been made either by delegation from the Chancellor, (*which does not appear*) or by commission from the Crown;

Crown; and if by commission, the same is not now extant, but is lost.

From the death of Queen *Elizabeth* to the 26 Oct. 3 Jac. 1. there is no commission for hearing causes extant on record, and yet without the supposition of a commission then in being, there is no tolerable account can be given *how* the Judges came to sit in Chancery, hear Motions, grant Orders, and make Decrees. The Author saith, in p. 82. *That in Trinity Term in the second of King James, some Entries are found of Judges sitting in Chancery, tho' no commission was then in being, authorizing them so to do.* The Author indeed makes a question whether they sat for the Chancellor, or the Master of the Rolls: But the first and previous question is, how they came to sit there at all, and whether it can be *presum'd* that they sat there *without a commission*. This sitting of the Judges was not only in *Trinity Term*, 2 Jac. 1. but in other Terms besides, between the accession of King *James* to the Crown, and the first commission extant 26 Oct. 3 Jac. 1. *Edward Bruce*, Lord of *Kinloss*, was sworn into the office of Master of the Rolls, 19 May, 1603. and the very next day, the 20 May, 1603. the court is held before

^g Pas. 1 Jac. 1. Reg. p. 586. a.

^h Ibid. p. 591. a.

Mr. Baron *Savil*, Master Dr. *Carew*, and Mr. Dr. *Tindall*, one Judge, and two Masters.

ⁱ *Wednesday* the 25 *May*, 1603. the court is held before the Master of the Rolls, Mr. Justice *Gawdy*, and three Masters.

^k *Friday* the 27 *May*, 1603. the court is held before Mr. Justice *Walmsley*, and three Masters: And in the case of ^l *Mead v. Flowerdew*, it is writ in the margin of the Entry of the Order, that it was afterwards vacated by Justice *Warburton*; and in other subsequent Terms, to *Trin.* 2 *Jac.* 1. there are several instances of Judges sitting in the Chancery, ^m some whereof are in the margin.

There are many ⁿ instances in *Trin.* 2 *Jac.* 1. of Judges sitting in Chancery; amongst others, there are ^o cross causes heard before the Master of the Rolls, Justice *Gawdy*, and Justice *Warburton*, and after *four days* spent in hearing, there is an Order made by the said Master of the Rolls and Judges, *That either of the said Parties shall make a true*

ⁱ 25 *May*, 1603. Reg. 610. a.

^k Pas. 1 *Jac.* 1. Reg. 623. a.

^l Reg. Pas. 1 *Jac.* 1. 625. b.

^m *Trin.* *Jac.* 1. Reg. 654. a. 668. a. Mich. 1 *Jac.* 1. Reg. 27. a. 29. a. Pas. 2 *Jac.* 1. Reg. 516. a. 892. b. 714. a.

ⁿ Reg. 905. b. 911. a. 918. b. 919. a. 921. b. 922, 923, 924, 925, 931, 932, 943, 944, 945, 947, 949, 970, 974, 1027.

^o *Trin.* 2 *Jac.* 1. Reg. 970. b.

Brief of all the points in question which they do stand upon.--- And the same Briefs by Monday next shall deliver to the right honourable the Master of the Rolls, and Mr. Justice Gawdy, and Mr. Justice Warburton, who will please to consider thereof, and give such order in the cause as shall be meet.

The Order reserv'd to be given, is to be done by all; and how the Judges cou'd do it without commission, I cannot account for.

These Orders and Decrees by Judges, are not only enter'd in the Registers, and preserved amongst the Acts of the Court, but some of them particularly appear to have been done by the exprefs knowledge of the Chancellor and Master of the Rolls, or one of them; so that whatever the Judges did in these several Terms, must of necessity be *presum'd* to have been *lawfully* done: And how it cou'd be done *without a commission* from the Crown, tho' not now extant, the Reader will consider.

I mention these things to show that where *commissions* are *wanting*, there may have been *real* commissions, tho' *now lost* for want of *enrollment*: However, it is own'd, that from 1605. till about two years ago, commissions have been continued to the Master of the Rolls, and others, to hear causes in Chancery in the absence of the Chancellor.

Here now it may, as the Author saith p. 139. be ask'd, how it came to pass that so

many special commissions have been issued, wherein the Master of the Rolls hath been inserted? It is a very pertinent question, which deserves an answer; and the answer which the Author gives to this in p. 139. is, *That it is proper to take notice that he hath not been able to find out any History or Memorial, giving the reason why this practice was introduced, and therefore it can only be accounted for by conjecture and supposition; but as he has not throughout his discourse argued from conjecture, but built upon matters of record and fact, he will not now go off from that solid foundation:* And then he immediately goes on, that *this practice of inserting the name of the Master of the Rolls in such commissions, can have no real influence upon the present question, unless some argument can be drawn from it against his having judicial power by virtue of his office.* If then such argument can be drawn, it hath a real influence upon the present question; but the Author indeed saith, p. 140. that *no such argument can be suggested except this, That the Chancellors who pass'd those commissions, and the several Masters of the Rolls who acted under them, were of opinion, that they could not hear and determine causes in absentia Cancellarii, without such a special authority.*

I believe most people will suggest this argument; it forces it self upon the reason of all
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mankind; it is so plain and obvious that it cannot be avoided.

The Author indeed hath here declared it to be his opinion, that no argument can be drawn from these commissions, directed to the Master of the Rolls, to hear and determine causes, against his having judicial power by virtue of his office; but other men may be of another opinion, and every man will, according to the measure of his own reason, determine whether it be not an easy, natural, and necessary conclusion, that if the Masters of the Rolls for 120 years last past, till about two years ago, have heard and determined causes in Chancery under commissions from the Crown, that such authority was *from the commission, and not by virtue of their office*: And that if they had had that power by virtue of their office, it had been unnecessary for the Crown to have granted such commissions, and injurious to the Masters of the Rolls to have accepted and acted under them: And that the Chancellors who pass'd those commissions, and the several Masters of the Rolls who acted under them, were of opinion, that they cou'd not hear and determine causes *in absentia Cancellarij*, without such a special authority, notwithstanding what is said by the Author to the contrary.

The Author in p. 56. cites Mr. *Crompton* for saying, ^p *That the Master of the Rolls is assistant to the Chancellor for matters of common law, and in his absence to hear causes and give orders*; to whom may be added Sir *Edward Coke*, who seems to have copy'd it from *Crompton*, ^q *That the Master of the Rolls, in the absence of the Lord Chancellor, heareth causes and giveth orders*: But neither of these writers say by what authority, or on what foundation the Master of the Rolls did this; The Author indeed saith, p. 57. that this jurisdiction cou'd not arise by any special commission, *because at the time of publishing Crompton's Book, anno 1594. Sir Thomas Egerton was Master of the Rolls, and no special commission was then subsisting*. But it hath been already shown, that it is not a necessary conclusion that a special commission was not then in being, because such a special commission is not now extant; there might have been one, tho' by some accident or misfortune it be now lost: And the late Lord Chancellor *Nottingham* did suppose there was a special commission then extant; for in a MS. ^r *de officio Magistri Rotulorum*, he cites the above-mention'd words of Sir *Edward Coke*, *In the absence of the Lord Chancellor the Master of the Rolls heareth causes and giveth orders*, 4 Inst.

^p Jurisdic. of Courts, 41. b.

^q 4 Inst. 97.

^r Penes honorabil' *Johan. Finch*, fil' præhonorabil' Com' *Nottingham*.

97. *but this, saith he, is not virtute officij, but by special commission.* Besides, supposing that at that time there was not any special commission then subsisting, yet the Master of the Rolls might do it by *delegation* or appointment from the Chancellor, *either by general or particular references*, which with innumerable other Orders and Acts of the Court, may be now lost and buried in oblivion : And it is plain that several of this kind are lost, for there are extant in the Registers, many Reports of Causes recited to be made on references, the orders of which references are not now to be found in the Registers.

Sir *Robert Cotton*, in his MS. treatise of the Court of Chancery, cited by the Author in p. 110. doth also quote or refer to this passage of Mr. *Crompton*, but with a material addition of two words, *sedente Curia* ; his words are, *That the Master of the Rolls is an assistant unto the Chancellor for matters of the common law, and also sedente Curia, i. e. sitting the Court, in the Chancellor's absence he doth hear causes and make orders in matters of equity.* *Crompton's Courts, fo. 41. b. Sitting the Court, i. e. the Court of Chancery*, where the Chancellor usually sits, not the Rolls, where the Chancellor never comes : And taking this to be the meaning of *Crompton*, the hearing of causes in court might very probably be by delegation. The Master

of the Rolls and the other Masters, as hath been shown in the former chapter, make interlocutory Orders in the absence of the Chancellor, and it is very probable that the Chancellor might in like manner authorize the Master of the Rolls to hear causes in court during his absence. The Chancellor leaving the Master of the Rolls to continue the business of the court after he was gone, was an imply'd delegation, as also his subsequent confirmation of what the Master of the Rolls did in court during his absence; or there may have been some general order for this purpose, which is not at this distance of time to be recover'd.

But even then the hearing of causes *at the Rolls* was not apprehended to be done without a special commission: The same Sir Robert Cotton immediately subjoins to the preceding sentence, *But I do not conceive by what authority the Master of the Rolls doth sit and determine causes in the Chapel of the Rolls, as of late years hath been used, unless peradventure he hath been authoriz'd thereunto by a special commission under the Great Seal, the first institution whereof was brought*

* The same is said in a MS. of the late Mr. *Asbmole*, in the *Asbmol. Musæum* at Oxford, N^o 7859. and in another MS. in the Library of his Grace the Duke of Kingston, and in the *Practice of the High Court of Chancery*. Edit. 1672.

in by Cardinal *Wolsey*. And it is observable, that in Sir *Robert Cotton's* time, and ever since, there hath been a constant and uninterrupted series of commissions; the Author ^u allows them to have been generally continued from the 26 Oct. 1605, till the time of the late Lords Commissioners, which is about two years ago; and such commissions have been in number so many, and for time so long, and so continually acted under by the Master of the Rolls, and never disown'd by any of them, that it hath grown into a common receiv'd opinion, and not a *superficial one*, as the Author calls it, p. 11. That the Master of the Rolls heard causes at the Rolls, by authority derived from such commissions, it being *inconceivable* that commissions shou'd without intermission, for one hundred and twenty years, have *constantly issued to the Master of the Rolls, to hear and determine causes*, with others; and that the Masters of the Rolls shou'd have acted with others under these commissions, in case the Master of the Rolls had had power and authority by virtue of his office, to hear and determine such causes by himself alone.

Anno 1643, 11 Nov. the Lords and Commons at *Westminster* appointed Commissioners of the Great Seal, and to have the like pow-

er and authority as the Lord Chancellor or Lord Keeper had, which Commissioners were sworn ^w 30 Nov. 1643. They afterwards pass'd another Ordinance for a commission to the Master of the Rolls, and others, to sit in Chancery; this Bill began in the House of Commons, and I find in the Journal of the House of Lords, of the 27 Feb. 1643. this Entry;----- *The Lord Viscount Say and Seal reported that the Committee have consider'd of the commission to the Master of the Rolls, and others, to sit in Chancery, and they find it agreeable to former commissions, and think it fit to pass with leaving out two names; which was read and approved of by this House accordingly, and order'd to be sent down to the Commons on Thursday morning next.* The commission is in two leaves after *entred' in hæc verba* in the Journal, and is in the same form as hath been constantly us'd to this time, and is directed to the Master of the Rolls, three Judges, and eight Masters of Chancery: Then there afterwards follows in the same Journal, *Thursday Feb. 29. 1643. A message sent to the House of Commons, to deliver them the commission to enable the Master of the Rolls and others to sit in Chancery, wherein their Lordships did agree with the putting out of two names, and the Commissioners of the Great Seal may be order'd to seal the same.* And

^w Rush. Part 3. Vol. 2. p. 341, 342.

the Commons return an answer the same day, concerning the commission to the Master of the Rolls, that they agree to the same with the amendments.

It appears from this Journal of the House of Lords, that the present form of the commission to the Master of the Rolls and others to hear causes in the absence of the Chancellor, was agreeable to former commissions before that time pass'd, and this commission was in the stile of those days, an *enabling* the Master of the Rolls *to hear causes*, which cou'd not be if he had had power to hear causes without it.

Whensoever a new Chancellor or Keeper is made, there is a Warrant directed to him under the sign manual for passing of Grants, Warrants, and other things directed to the late Chancellor, not then pass'd under the Great Seal; in which likewise are these words: *And whereas we are likewise given to understand, that there are divers Injunctions, Decrees and Dismissions, by order in our said court of Chancery, given by the Master of the Rolls and other our Commissioners, which Decrees, Injunctions and Dismissions, ought to be sign'd by our Chancellor or Keeper of our Great Seal for the time being, and are not yet sign'd, we have thought good likewise to give you full power and authority to affirm and subscribe all such Injunctions, Decrees and Dismissions, according to the Orders*
enter'd

enter'd concerning the same in the Registers Office of Record, or so many of the same as you shall think fit, without further hearing, and to pass such as you shall allow and subscribe unto under the Great Seal. One of these instruments, directed to Sir Thomas Coventry, is lately printed in the additional Volume to Rymer's Records, Vol. 18. p. 222. which form is the same in all the material parts of it, that hath ever since been follow'd.

This Warrant takes no notice of any Decrees made by the Master of the Rolls any otherwise than as a commissioner, and authorizes the new Chancellor to affirm and subscribe only such Decrees and Dismissions as were given by the Master of the Rolls and others the King's Commissioners.

No man can conceive but that the Lords Keepers of the Great Seal are superior in Chancery to the Master of the Rolls, and that each of them must have as much power and authority in that court as the Master of the Rolls; but yet if our Author's notions of the power of the Master of the Rolls be true, it will not be so. The Act of Parliament 1 Gul. & Mar. cap. 21. intituled, *An Act for enabling Lords Commissioners for the Great Seal, to execute the office of Lord Chancellor, or Lord Keeper*, doth allow any one Commissioner, in the absence of the others, to hear motions, and give orders and
 3 directions

directions touching the interlocutory proceedings in any cause; but enacts, that *such one commissioner in the absence of the others, shall not make any Decrees unless there be two commissioners present.* If the Master of the Rolls happens to be one of such commissioners, then, according to the Author's doctrine, he is, if it be in nature possible, *both* the supreme and subordinate Judge, and being so, may act in either capacity, only with this difference, that in the *subordinate Judgeship* as Master of the Rolls he may make Decrees by himself, but in the *superior Judgeship* as one of the Keepers of the Great Seal, he cannot make a Decree without the joyning of another with him; so that as a Commissioner of the Great Seal he hath in this respect less liberty of acting than as Master of the Rolls, and if he be not a commissioner, then as Master of the Rolls he hath in the same respect a *greater liberty of acting, than the commissioners themselves.*

Amongst the MSS. of the late Earl of Nottingham, late Lord Chancellor of England, there is a little tract of his collection or composition, intituled, * *De officio Magistri Rotulorum*, the sixth article or head whereof is in these words; *In the absence of the Lord Chancellor the Master of the Rolls heareth causes and giveth orders,* 4 Inst. 97. *but this*

* Penes honorabil' Johannem Finch, fil' Com' Nottingham.

is not *virtute officij*, but by special commission, as do also the Judges of the common law; but there ought always to be two of the Masters of Chancery assisting, who are equal in commission, and may over-rule as they did at the Rolls in the case of the Lord Cavendish v. Meath, and their opinion was afterwards approved by the Lord Chancellor Shaftsbury, against the Master of the Rolls.

Here is the direct and express opinion of a most learned Chancellor, that the Master of the Rolls doth not hear causes *virtute officij*, but by special commission; and this opinion warranted by the judgment of the preceding Chancellor, viz. the Earl of Shaftsbury, and of the then Master of the Rolls Sir Harbottle Grimston, in the case of Lord Cavendish v. Meath.

I have search'd after this case of Lord Cavendish, and find the case to be about money won at play by Earl Meath from Lord Cavendish, and that the Earl of Meath being indebted to several tradesmen, procured Lord Cavendish to enter into bonds to those several creditors, and the Earl of Meath was bound with him as his surety, and had a counterbond from Lord Cavendish to save him harmless; and a bill was brought by Lord Cavendish, praying to be relieved, paying only the principal money, because the debt grew from play. This case came to be heard at the Rolls, Friday Jan. 31. 1672. before the

the Master of the Rolls, Sir *William Child* and Sir *Mondiford Bramston*, two Masters, where the Master of the Rolls was for giving relief, and the two Masters against it; the entry whereof is as follows:

At the Rolls

Veneris 31 Jan. 1672.

Master of the Rolls,
Sir William Child,
Sir Mo. Brampton.

Com' Cavendish,
Com' Meath.

Cur' Do declare since the Statute, none can recover principal above such a sum, and before, this court did ever relieve against the interest; and tho' these tradesmen must have interest upon their Bonds, and what Lord *Cavendish* doth pay over for these, over and above the principal, decree the Earl of *Meath* to repay.

Cur' Decree the Earl of *Meath* to deliver up the counterbond to the Plaintiff, the Plaintiff paying to the Earl of *Meath* whatever he hath paid to any of the creditors on any of the Bonds, where Lord *Cavendish* and Lord *Meath* were bound for principal; but

Id est, The Master of the Rolls being the first of the court, and speaking the opinion of the court, if not afterwards contradicted.

the

the Defendant not to be allow'd for what he paid for interest, being the interest but of his own debts; but the creditors must have their principal and interest on their bonds.

Sir *Mo. Brampston* do conceive whatever the Earl of *Meath* hath paid on any of the Bonds to the creditors since the counterbond given, the Earl of *Meath* ought to be relieved, for

Sir *William Child* declares himself of the same opinion.

Cur^r Since the Masters do differ from me in opinion, let the Cause be procured to be heard before the Lord Chancellor for his opinion, and continue the Injunction ^z meane.

So that here the two Masters over-rul'd the Master of the Rolls in a point of Judgment; whereupon the Cause was set down to be heard before the then Lord Chancellor, the Earl of *Shaftsbury*, who being assisted by the Lord Chief Justice *Hales*, heard the said Cause, on the 22 day of *April* following; and as it appears by the Records of the Court, as well as by the said MS. of the said late Earl of *Nottingham*, determined it on the same side as the Masters wou'd have done.

It appears evidently from hence, that it never entred into the imagination, either of the Earl of *Shaftsbury*, the then Chancellor, or of Sir *Harbottle Grimston*, the then Master

^z I. e. in the mean time.

of the Rolls, that the Master of the Rolls then heard Causes at the Rolls, *virtute officij*, or by any other authority than that of the *King's Commission*.

As their opinion was, that the Master of the Rolls hears Causes at the Rolls *by virtue of the King's Commission*; so also, as is before related, was the opinion of the next Keeper, or Chancellor, the Earl of Nottingham.

This was likewise the judgment and declared opinion of his successor, Sir Francis North, Lord Guilford.

The late learned and judicious Mr. *Vernon* reports, that in *Michaelmas Term 1684*. there was a case, *Smith v. Turner*, of which he gives this account. Upon a *Bill of review* the error assign'd was, that there was no ground for making this Decree, more than that it is mention'd in the Decree, that it was made by the consent of the Plaintiff's Counsel, and that he ought not to be concluded by the consent of his Counsel, and that was allow'd to be a good error; as also, that the Decree was made by the Master of the Rolls alone, and he cannot, by his Commission, make a Decree without the assistance of two Masters.

The learned Editors of those reports have, I suppose, in ^b justice to the memory of that

^a Vide *Vernon's Reports*, 273.

^b Preface to *Vernon's Reports*.

great man, whose abilities, in his profession, are so well known, or for some other reasons, added a note, that this case not being warranted by the Record, they have there, as they say, printed the words of the Record it self; which is only the Record of the order of the Court, upon the hearing of the Defendant's Plea, and Demurrer to the Plaintiff's Bill of review, which is always drawn up brief and short; but if they had had the leisure to have read over the Bill of review it self, and the Plea and Demurrer which are extant upon Record, they wou'd then have better seen, whether there was any reason to stigmatize Mr. Vernon as a man wanting truth and veracity in a thing reported by him of his own knowledge.

It will be tedious to the reader to go through this whole Record of the Bill of Review, Plea, and Demurrer; these Gentlemen may correct themselves by reading it *when they have leisure*; but as to that part of the case which relates to the present matter, *that it was allow'd, not said assign'd to be a good error, that the Decree was made by the Master of the Rolls alone, and he cannot, by his Commission, make a Decree without the assistance of two Masters*: This plainly came under the consideration of the Court; for the Plaintiff in his Bill of review sets out the Decree complain'd of, which was made on a default to be *before the Honourable the Master of the Rolls,*

Rolls, at the Rolls, without mentioning any others to be with him; and the Defendant in her Plea affirms, that the Decree was not truly set forth in the Bill, and then sets forth the Decree to be made before the Master of the Rolls, Sir *Edward Lowe*, and Sir *Samuel Clarke*, two Masters; and sets forth some other matters, by way of Plea, and then demurs. On the arguing of this it was *natural* for the Court to say, that if the Decree had been made by the Master of the Rolls alone, as was alledg'd in the Bill of review, it had been *Error*, because the Master of the Rolls cannot, by his Commission, make a Decree, without the assent of *two Masters*; but it appearing by the Defendant's Plea, that the Decree was made by the Master of the Rolls, with the assent of two Masters, therefore this Decree was not Erroneous; and there being no other apparent error in the Decree, did thereupon allow the said Plea and Demurrer.

The same learned Editors have likewise added another note to another case, ' reported by Mr. *Vernon*, viz. *Merreit v. Eastwick*, who relates, that upon hearing of the Cause, Mr. *Baron Atkins* was of opinion the Plaintiff came too late after a recovery at Law, and would have dismissed the Bill, but Sir *Samuel Clarke*, Sir *Miles Coke*, and Sir *William*

c Vide *Vernon's Reports*, 265.

Beversham, the Masters in Chancery, stood up and oppos'd it, being of opinion, that there ought to be relief, and a Decree for the Trust; and thereupon the Court being divided no order was made; and the Cause standing in the paper the next day, came on to be heard before the Lord Keeper, who decreed according to the opinion of the Masters: To which case the Editors have added this note, Upon searching the Record of this case it appears, that this Cause was heard before the Lord Keeper, on the 8 of November, and such Decree made as above; but it does not appear by the Record, that this Cause had come on before Mr. Baron Atkins the day before: But they that have no mind to find, will never search in a proper place. If they had search'd in the proper place, viz. the Minute Book of the Court, taken the 7 of November, when this matter happen'd, there they wou'd have found this entry,

Mr. Baron Atkins.

Sir William Beversham.

Sir Samuel Clarke.

Sir Miles Coke.

Merreit

v.

Eastwick.

} The Court differing in opinion, therefore let the Cause stand to be heard by the Lord Keeper.

This

This I think will sufficiently justify the fidelity and exactness of Mr. *Vernon*, and the reader will, I hope, pardon this short digression, to justify a Gentleman's memory, which will ever be preserved with respect and veneration.

But to return, I shall trespass on the reader's patience, with only one instance more, to show that it hath been the common receiv'd opinion, that the authority of the Master of the Rolls, to hear Causes at the Rolls, was by the King's commission, and that is, that there is a clause in those commissions, that all the Decrees made under them, must be made by *three* of the Commissioners at *least*, whereof the Master of the Rolls, or one of the Judges, must be one, and are to be *subscribed by three*, and that none of these Decrees shall be inrolled, unless the *Chancellor first signs them*. According to this provision in the commission, the method hath been to enter in the Register Books the names of the Masters, who sit with the Master of the Rolls, at the Rolls, and inscribe them in the margin of the decretal Orders made at the Rolls, and in such manner to present them to the Chancellor. The author owns in p. 90. *from the 26 Oct. 3 Jac. commissions for hearing Causes in Chancery with a Quorum, have been generally continued*, and the entries in the Register Books have, for the most part, been regularly made, *i. e.* specifying the

M 3

three

three Commissioners, by whom the Cause was determined; and he might as truly have added, that the Decrees at the Rolls were drawn up, not only with the *stile* of the Master of the Rolls, but also of *two* other Masters at the top of the margin of such Decrees. The author doth indeed affirm in p. 117. *That great numbers of Decrees have been made by the Master of the Rolls sitting alone, and have been drawn up with the stile of the Master of the Rolls only, as sitting at the Rolls, at the top of the margin of such Decrees; and that this practice in the Register's office every one of the four deputy Registers found there, when they came to their respective offices.*

That some Decrees have been in fact made by the Master of the Rolls sitting alone, I believe to be true: But that such Decrees have been drawn up, *till now very lately*, with the stile of the Master of the Rolls only, as sitting at the Rolls, at the top of the margin of such Decrees, is a fact that, I think, is *otherwise*; for I have heard it related, by persons of credit and knowledge in these matters, that the late Sir John Trevor did many times in fact hear Causes alone in his chamber, especially when they were by consent; yet if there was any occasion to draw up such Decrees, in order to have them sign'd and inroll'd, *he directed*, that the *names of two Masters* should be added to his own at the top of the margin; by which means, upon presentment to
the

the Chancellor, those Decrees appear'd to the Chancellor, to be made according to the tenor of the commission.

I believe likewise, that *very lately* there have not only been Decrees made in fact by the Master of the Rolls alone, but that they have been likewise drawn up with the stile of the Master of the Rolls only, at the top of the margin of such Decrees.

But this is a *very late innovation*, and however *strongly* it be *affirmed* by the author, *That this practice in the Register's Office, every one of the four deputy Registers found there, when they came to their respective offices; yet the reader will see the contrary from the following certificate, under all their hands; for the Lord Chancellor that now is, desiring to be informed of the practice herein, sent a question concerning this matter, to the four deputy Registers, who sign'd and return'd this following answer.*

To the Right Honourable the Lord High Chancellor of Great-Britain.

WE the deputy Registers having receiv'd your Lordship's commands, to return, in writing, an answer to the questions following, *viz.*

Whose names have been us'd to be inscrib'd in the margins of decretal Orders, made at the Rolls? and hath there been any alteration in the method formerly us'd? and if so, when, and how did it happen?

In obedience to such your Lordship's Commands, we humbly certify to your Lordship, that upon our first coming into the Register's office, respectively, we found the usage to have been, that in all decretal Orders, made at the Rolls, in the margin thereof, opposite to the date of such Order, there was inscribed, at

At the Rolls.
Master of the Rolls,
Mr. Holford.
Mr. Lovibond.

the Rolls, Master of the Rolls; and then the names of two of the Masters of the Court, in such manner as in the margin hereof is described; and that such usage was continued during the life time of Sir *John Trevor*, late Master of the Rolls; but whether there hath been any alteration since made, in the method so formerly us'd, or not, the underwritten *Edward Goldesbrough* and *Richard Price* cannot say, they having not officiated as Deputy Registers at the Rolls. And the underwritten *Thomas*

Parnell

Parnell and *Thomas Paratt* say, that the usage aforesaid continued for some time after the death of the said Sir *John Trevor*, until his honour, the present Master of the Rolls, was pleas'd to direct, that the names of the Masters shou'd not be inscribed in the margin of any decretal Order, made on hearing, by consent; or on any other decretal Order, where the Masters did not attend the Court, at the hearing of the Cause.

9 May, *Edw. Goldesbrough.*

1726. *R. Price.*

Tho. Parnell.

Tho. Paratt.

I have been so long on this chapter, that I shall not trouble the reader with a recapitulation of the matter contained in it; I shall leave it to his own reflection, whether it be not fully proved, that the Master of the Rolls is no Judge, either in Law or Equity, in the Court of Chancery; but whatsoever judicial power he hath lawfully exercis'd, hath been either as one of the twelve Masters in Chancery, or by virtue of the King's commission.

That which remains to be done, is to make some remarks on the author's proofs, for maintenance of his own scheme, and to answer some objections, that may be collected out of his discourse, against the matters contain'd in this treatise; which will be the contents of the following chapter. C H A P.

C H A P. V.

Remarks on the Author's Discourse of the Judicial Authority belonging to the Master of the Rolls, &c. with an answer to several objections, which may be from thence collected against the matter of this Treatise.

THERE are several matters contain'd in the Author's Discourse, which may be objected against some parts of this Treatise, or be us'd as arguments to defend his scheme; some of these have already been taken notice of, others of them have been put into another light, and may from thence be easily solv'd by the Observing Reader; and as to the rest, it will make this treatise too voluminous to enter into the particular minute consideration of them all: But however, I shall with all the brevity I can, take notice of what is most material, that so the reader may have sufficient whereon to form his judgment.

In the prefatory part of the Author's discourse, there is a great deal said of the constitution of the Court of Chancery, and of the necessity of a second Judge in the Court, and of conveniency that there shou'd be such

a one: But as all that is *pure* imagination, without *any* authority to *support it*, and the whole there alledg'd may be supply'd by a ministerial officer, there is no need to give any answer to it.

The Author in p. 13. lays down this general position, *That the Master of the Rolls hath a judicial power in the court of Chancery, inherent in his office*; and in order to explain and particularize it, and then make it good, lays down five points, which are the contents of the five sections of his discourse.

The first point contain'd in the ^e first section, is, *That the office of Master or Keeper of the Rolls is an ancient office, and, in the nature of it, proper to have judicial power.*

There is no doubt but it is an ancient office, and, as the ^f Author writes, *notice is taken of the Keeper of the Rolls in the Register of Writs, the Ancientest Book in the law.* But the like notice is taken of *the Masters* in the ^g same Book, who for any thing appearing to the contrary may be as ancient; and yet neither the antiquity of the one or the other is a proof that either of them are judicial offices, or in the nature of them proper to have judicial power.

It is also true, that the Keepership of the Rolls hath always been an office of dignity and preheminance; and supposing it likewise to have been always in the gift of the Crown,

^e P. 15.

^f P. 15.

^g Reg. Or. 21. a.

and never of the Chancellor, (which yet may be fairly question'd) yet this doth *not* prove the office either to *have* judicial power, or to be *proper* for it.

There are some ^h few instances contained in instruments relating to foreign affairs, where the Master of the Rolls is call'd *Vice-Chancellor*; but such a compliment in a Credential is of ⁱ no use *towards* proving that the Master of the Rolls, as *Vice-Chancellor*, had *anciently a jurisdiction in the court of Chancery in the stead or aid of the Chancellor*; there is no such appellation belonging to him in law, but there is in law another real *locum tenens*, or Deputy of the Chancellor, known by that name, *viz.* the Keeper of the Great Seal, who is so call'd in numberless Acts: I shall mention only ^k Sir *Edward Coke*, *That the locum tenens of the Chancellor is to be taken for one that holdeth the place, or hath equal authority of the Chancellor, and that is custos sigilli, or the Keeper of the Seal.*

Another of the Author's arguments from probability or fitness to prove the office of the Master of the Rolls to be attended with a judicial power in the court of Chancery, is, that this will appear to be ^l more agreeable to the constitution of other courts, if it be consider'd, *that there is no instance that the custody of the Plea or Judgment Rolls is in any*

^h P. 34.

ⁱ P. 25.

^k 4 Inst. 81.

^l P. 25.

other court lodged with those who have no judicial power in that court, as the Lords chief Justices of the courts of King's Bench and Common Pleas have severally the keeping of the Plea and Judgment Rolls of those courts, and in the court of Exchequer the custody of such Records is in the Treasurer and Barons of the Exchequer, and all Writs for removing and certifying any of those Records, must be directed to those officers respectively as the case happens to concern the one or the other of those courts.

The Author warily confines this custody to that of the Plea and Judgment Rolls, for he must know that there are other Records of every of the said courts, which are not in the custody of the Judges of the Court; and that Writs for removing and certifying such Records, are not directed to any Judge of the Court, but to the Officer of the Court, who hath the custody of them. This is the case of the two *Custos Brevium's* in the King's Bench and Common Pleas; and the Author admits the custody of such Records in the Exchequer, to be in the Treasurer as well as in the Barons of the Exchequer, when yet the judgment is given by the Barons only. The truth is, the Records of all the King's Courts belong to him, and are part of his Treasure, and tho' the Judges and Officers of his Courts have them in their possession; yet it is only till he thinks fit to remove them, and lodge

lodge them elsewhere, as in former reigns it was frequently done. There are many instances of the King's removing, by Writ, the Records of Chancery, King's Bench, and Common Pleas, to the Tower of London, or elsewhere, to be there kept.

And as to those Courts of the King which are only temporary, as Justices of Assize, Oyer and Terminer, and Gaol Delivery, the custody of their Records are so far from being by law in the custody of the Judges of these Courts, that by 9 E. 3. c. 3. the Justices of Assize, Gaol Delivery, and of Oyer and Terminer, are required to send all their Records and Processes determined and put in execution, to the Exchequer, at Michaelmas once every year, to be deliver'd there, and the Treasurer and the Chamberlain which for the time shall be, having the sight of the commissions of such Justices, shall receive the same Records and Processes of the said Justices, under their Seals, and keep them in the Treasury, as the manner is.

Another probable argument urged by the Author, is from *that*¹ *Writs of Error brought upon Judgments given in the Petty-bag, which is the common law side of the Chancery, are always directed to the Master of the Rolls; and there is no instance in the Register of any Writ of Error, of a Judgment being directed to a person not being a Judge of the Court where such Judgment was given.*

¹ P. 26.

The reason why Writs of Error on Judgments given on the law side in Chancery, are directed to the Master of the Rolls, is, because he hath the keeping of the Records of which the Writ of Error is brought; and that is the reason why Writs of Error on a Judgment given in the Exchequer, are directed to the Treasurer and Barons, because they *all have the custody* of the *Record*, tho' the Barons *only* gave the Judgment; and why Writs of Error are directed only to the Chief Justices of the King's Bench and Common Pleas respectively, because tho' the other Judges gave the judgment with them, yet the Chief Justices *only* have the *custody* of the *Plea Rolls* and *Judgments* of their respective Courts; and from this cause, if the Error assign'd be in a Record which is not in the custody of the Chief Justice, but, for instance, in the *Custos Brevium*, the Writ to remove and certify that Record, must and constantly doth go to the *Custos Brevium*, and not to the Chief Justice.

By these instances it may be seen how *easy* it is to be mistaken in *probable arguments*, or in arguments from *conveniency* or *fitness*. Men many times see *conveniencies* or *inconveniencies*, *fitness* or *impropriety*, in different lights: The *proper* arguments in this case, are *facts* and *usages* whether it *hath* been *so*, or *hath not been so*.

The

The rest of the first section is spent in answering objections which the ^m Author saith *he hath heard* rais'd under that head.

Some of these objections are in effect answers to some arguments arising from the manner wherein the mastership or custody of the Rolls hath been granted, contain'd in p. 103, &c. of this Treatise, to shew the said office to be only ministerial, and not judicial; which, to avoid breaking the thread of my discourse, I did not then consider, and therefore shall here more particularly examine.

One argument made use of by me in p. 103. to prove the office of Master or Keeper of the Rolls to be only ministerial, was, that *it hath been frequently granted in reversion, and hath been enjoy'd and held under such Grants, and that it is a rule of law that a judicial office cannot be granted in reversion.*

The author admits the fact, *that Reversionary Grants have been made of the office of Master of the Rolls: " But that it follows from thence, that it is not a judicial office, or cannot have judicial power incident thereto, the Author saith, is by no means a just conclusion; nay that it appears much more reasonable to infer from the same premises, that those Grants were void in law; and it is truer logic to argue thus: The office is judicial, therefore it cannot be granted in Reversion, than*

to say, that *Reversionary Grants* have been *de facto*, made of this office, therefore 'tis not judicial; and this, our author saith, appears to have been the way of reasoning of one learned Master of the Rolls, Sir Julius Cæsar, who, tho' he had a *reversionary Grant*, took a new one as soon as the office fell to him in possession.

The *logick* may be true in each, or either of these ways of arguing, according to the subject to which it is apply'd; if the reasoning be about an office, *agreed* to be judicial, and which hath not heretofore been granted in Reversion, it is a just argument to say, it is a judicial office, and therefore cannot be granted in Reversion, the Grant of the Reversion is void; but if the reasoning be about an office, which is not *esteemed*, nor doth appear in its *nature* to be *judicial*, and which hath frequently been granted in Reversion, the argument is as just to say, it hath been frequently granted in Reversion, therefore it is *no judicial* office.

What was the particular reason for which Sir *Julius Cæsar* took a new Grant of the Mastership of the Rolls, when his *reversionary Grant* took effect in possession, I can't tell; the author only guesses, but to me it seems demonstration, that neither Sir *Julius Cæsar*, nor Sir *Edward Philips*, nor Sir *Dudley Digges*, who had all of them *Reversionary Grants* of the Mastership of the Rolls, cou'd argue according to that, which our Author

calls the *truer logick*, that the office granted to them severally in reversion was judicial, and that therefore the said several Grants were all of them void; it is too great a reflection on the understandings and abilities of those great and learned men to imagine, that they *knowingly* took *void* Grants.

The learned persons who accepted those reversionary Grants, cou'd not possibly argue in this manner; but they must have taken the Grants of the Reversion to be good, and then the *logical* conclusion was, *that therefore the office so granted, was a ministerial, and not a judicial office.*

But the author saith p. 31. *That he doth not wholly rely upon this answer*, and therefore he goes on to consider on *what foundation this general rule of law stands*, viz. that judicial offices can't be granted in Reversion, and with what *limitations it is to be understood*. He saith truly, the rule is taken out of Auditor Curle's case, in Coke's 11 Report, and then hints at some objections to it; but this, he saith, he does not mention *in order to dispute the authority of Auditor Curle's case* (which, as a general rule, is, and ought to be taken for law at this day) but to show that a contrary opinion might sometimes have prevailed, and therefore that no inference can be drawn from an office, having in former times been granted in Reversion, to prove that it is not judicial,

¶ Vide 11 Coke's Reports, 2, 3, 4.

and

and that this is plain; because Reversionary Grants have been made of judicial offices, as of a Baron of the Exchequer 8 E. 4. and in Hard. 357. It is laid down by Lord Chief Baron Hale, that by usage and custom a judicial office may be granted in Reversion.

I may venture safely to say, that such a reversionary Grant of the office of a Baron of the *Exchequer*, wou'd now be a void Grant; and where such a Grant is good, by usage or custom, it is equal to an act of Parliament, by which, no doubt, a judicial one may be granted in Reversion; but the author *admitting the authority of Curle's case, and that as a general rule, it is to be taken to be law at this day*; I leave the reader to make the inference for himself in this case.

And whosoever shall consider, that Auditor *Curle's* case was, after several arguments, and on consideration and conference between the two Chief Justices, and Chief Baron, unanimously resolv'd in *Hillary Term 7 Jac. 1.* and that it was then declared for a rule in law, that the Grant of judicial offices in Reversion was a void Grant, and that the several Grants of the reversion of the office of the Mastership of the Rolls, to Sir *Edward Philips*, Sir *Julius Caesar*, Sir *Dudley Digges*, and Sir *Humphry May*, were made at times not far distant from this Judgment, whereof most of them cou'd not be presum'd to be ignorant; I say, whosoever shall consider and

lay all these things together, cannot well conceive that any of those learned persons wou'd with open eyes have taken Reversionary Grants of that office, which if it were a judicial one, was then declar'd to be void; but the reason is on the other side, that they did not take this office to be a judicial one, but only ministerial, and *therefore* the Grant of the Reversion was good.

Another argument made use of by me in p. 104, 105. against the Master of the Rolls's office being a judicial office, is, *That this office hath been usually granted to be exercis'd by deputy*; and that in fact it hath been exercis'd by deputy; and that it is another rule of law *that a judicial office cannot be granted to be executed by deputy*. The Author ^a admits *that this office hath been usually so granted*; but, he saith, *the single instance extant of such a deputation, is that made by the Lord Ellesmere to Mr. Lambard in 1597.*

Tho' there shou'd be only this single instance extant of such a deputation, yet it is probable there have been more, this clause of exercising by deputy, being in all or most of the Grants of this office; but whether there be any other instance extant or no, is not material: It is sufficient that for several years it was exercis'd by deputy; one single instance of a deputation, and an acting under that deputation, shows that it is an of-

fice that may be exercis'd by deputy; but to avoid the force of this, the Author adds, that this deputation made by Lord *Elsemere* to Mr. *Lambard*, is expressly confin'd to the custody of the Rolls house, and safe keeping and ordering of the Records, no words being inserted in that instrument, which do either express or imply any delegation of the judicial authority; and it should seem from thence to have been the opinion of that great man, who well understood the nature of the office of the Rolls, that these words in the Grant, To be exercis'd by deputy, ought in point of law to be understood only of such parts of his office as are mention'd in the deputation.

But whosoever will compare the Grant of the Keepership or Masterhip of the Rolls to Lord *Elsemere*, with his Deputation made to Mr. *Lambard*, will find that the one is as large as the other, and that whatever is by the Grant committed to the Principal, is comprehended in the deputation.

It is true that there are no words in the deputation that do *either express or imply any delegation of judicial authority to the Deputy*; but it is as true there are no words in the Grant to the *Principal*, that either express or imply any delegation of judicial authority to him.

The Author doth not pretend that there is any judicial power expressly granted to the Master of the Rolls by his Patent, but what he saith, is, “ That a judicial authority is in-

cident or belonging to his office, p. 30, 103, 105. and *that it is an office accompanied with judicial authority*, i. e. that it is appurtenant or appendant to the office. Now I wou'd desire him or any man whatever, to give an instance of a thing *appurtenant or appendant*, to subsist *without* the thing to which it is appurtenant or appendant.

The deputation to Mr. *Lambard*, comprehended the office: If a judicial power was incident to the office, then it must by necessary operation of law have pass'd to him with the deputation; but tho' he exercis'd the office, yet he never exercis'd by virtue thereof any judicial power; and therefore 'tis a plain inference that this office was only a ministerial office, and so to be exercis'd by deputy, as other ministerial offices are.

The Author seems to be sensible of this, and of the natural consequence, that if the Mastership of the Rolls be exerciseable by deputy, that then it is not a judicial office: Therefore in p. 35. he hath recourse to another answer, which is, *That instances are not wanting of judicial offices granted to be exercis'd by deputy*. The consequence of that, as to this point, shall be seen presently; but first for his instances:----- The first is, *That the office of Lord Chancellor or Lord Keeper it self has been granted to be executed by deputy*; which, he saith, appears by several Records, particularly one in 16 H. 3. and the Statute

27 E. 1. What is not produced, I can't give an answer to; but I am sure that the Records produced, do not prove that *the office of Lord Chancellor* was granted to be exercis'd by deputy: For as to the first Record of the 16 H. 3. that was not a Grant of the office of Lord Chancellor, but a Grant of another office to the Chancellor. In ancient times the offices of Chancellor and Keeper have been distinct, and when they were at the same time distinctly held, the keeping of the Seal was purely ministerial, which by Grant or License from the Crown might be exercis'd by deputy.

At this time of the 16 H. 3. the Chancellor had not the custody of the Great Seal; for I find that *Ralph*, Bishop of *Chichester*, was the 12 Feb. 11 H. 3. made Chancellor for his life; and continuing so to the 16 H. 3. the King then by the Patent cited by the Author, grants to the said Bishop, by the name of *Cancellario nostro*, the custody of the Great Seal for his life, so that he may carry and keep the Seal in person as long as he will, or by deputy, &c. Here is no Grant of any exercise of the Chancellor's power by deputy, and as to the Keeper of the Great Seal, it is only that he may *carry* and *keep* the Seal by himself or deputy.

The second Record produced by the Author, whereby he saith it appears *that the office of Lord Chancellor or Lord Keeper it self*

bath been granted to be executed by deputy, is in the Statute of 27 E. 1. call'd Ordinatio de libertatibus perquirendis, wherein it is directed that Inquests taken upon Writs of Ad quod dampnum, shall be certify'd to the Chancellor or his deputy.----- The finding the word deputy in this Act seems to have led the Author into a notion that the Chancellor cou'd himself make a deputy, and that this power of making a deputy was contain'd in his Grant of Chancellor. If this was not his way of thinking this authority was nothing to the purpose, for which it is produc'd by him; but all this is a mere mistake, the deputy in this Act, and in numberless instances besides, is the Keeper who was made by the King. “ It is *to be observ'd*, saith Sir Edward Coke, ^b that where *divers ancient Statutes*, amongst which this Statute is one pointed to in the margin, speak of the Chancellor, and of his lieutenant, it must of necessity be intended of such a lieutenant as the law doth allow of, and that cannot be of a deputy; for the Chancellor cannot make a deputy, but *locum tenens* is to be taken for one that holdeth the place, or hath equal authority of the Chancellor, and that is *Custos Sigilli*, or the Keeper of the Seal.

The next instance of a Judge in Equity granted to be exercis'd by deputy, is the

^b 4 Inst. 88.

office of *Chamberlain* of Chester, and is at this day exercis'd by a *Vice-Chamberlain*. This Grant is warranted by prescription, which cannot be said of the case in question; for there was no Grant or Patent to the Master of the Rolls to exercise his office by deputy, till the time of R. 3. or E. 4. at soonest.

The last instance the Author mentions of judicial offices granted to be exercis'd by deputy, is the office of *Sheriff*, which, as 'tis said by the Author, p. 36. tho' it be partly ministerial, is also judicial as to criminal proceedings in the *Sheriff's* turn; and also as to civil proceedings on *Writs* of *Redisseisin*, and some other *Writs*,--- and yet is at this day, even in the judicial part of it, executed by deputy, who is the under *Sheriff*, tho' a power of making a deputy is not express'd in the Grant.

As to this instance, that I may not tire the Reader, I shall only desire him to peruse and consider what is said by the Lord Chief Justice *Hobart*, in the case of *Norton v. Simms*, Hob. 13. "That a *Sheriff* in making
 " an under *Sheriff* doth implicitly give him
 " power to execute all the ordinary offices of
 " the *Sheriff* himself, that may be transferred
 " by law, as serving of *Process* and *Execu-*
 " tions, and the like; but he cannot deal in a
 " *Writ* of *Redisseisin*, because in that the *She-*
 " riff is a *Judge*.

I think, from what hath been said, I may safely say, that of the four instances produc'd by the Author, of judicial offices being granted to be executed by deputy, he is mistaken in the facts of three of them, and in the consequence of the other; but supposing they were all such as he wou'd have them, what do they signify to this purpose? These are cases where the deputy hath all the power of the Principal, and by being deputy exercises judicial power as the Principal himself doth: But what is that to this case where the deputy doth not exercise one single judicial act, nor ever pretended to it? Let there be never so many instances of judicial offices whose deputies act judicially as their Principal, doth that prove that the office of the Master of the Rolls is a judicial office, when the deputy of that officer never doth one judicial act? Is it not a proof of the contrary, that the Master of the Rolls is only a ministerial officer, because his deputy doth only ministerial acts? And is it not a natural, plain and easy way of arguing, that seeing the Master of the Rolls may make a deputy, and that when that deputy is made, he doth no judicial acts, but only ministerial ones, that the Master of the Rolls himself is only a ministerial officer, and not a judicial one?

The Author's ^c second Section is to prove
that the Master of the Rolls hath, and always

^c P. 41.

had,

had, jurisdiction on the common law side of the court of Chancery, by virtue of his office: And to make out this, he saith, ^a That the exercise of judicial authority on the common law side of the court, may be reduc'd to four heads: The first whereof is, The admission of officers of the court. The Master of the Rolls not only nominates, but admits and swears officers, as well on the law side as on the equity side of the court; and ^c once had the nomination and admission of all the officers of the court, except such as were created by the King's Letters Patents; for in that manner the Crown hath anciently appointed Masters in Chancery.----- By the general rule of law the Judges in their several courts have the nomination of the officers of those courts.--- Now it wou'd be very unaccountable that all the clerks or officers of the Chancery, except those appointed by the crown, shou'd be in the nomination of one who was no Judge in that court, and that that officer who as some have thought is the only Judge, shou'd not have the nomination of any.

If the Author's facts be true, and his reasoning right, if all the clerks and officers in Chancery, except those appointed by the Crown, be in the nomination of the Master of the Rolls, and if by the general rule of law the Judges in the several courts have the nomination of the officers of their courts,

^a Ibid.^c P. 43.

then

then the Chancellor not appointing any one officer in the court of Chancery, *cannot be any Judge at all there*; but the Master of the Rolls, who appoints all, except where the Crown intervenes, must be the sole and only Judge, which perhaps is farther than the Author meant to go, but is the natural consequence of his facts and reasoning thereon.

It will not be very difficult to show that the Author is mistaken in some of his facts, as also to show the particular occasion and foundation of the Master of the Rolls's nomination to the offices in his gift; from whence will arise other kind of inferences than the Author makes; but that will lead matters into a length, and therefore I will rather take the facts just as the Author himself hath stated them, and from them so stated there is not any proof that the Master of the Rolls is any Judge in the court, or that he doth therein any other judicial acts than what is done by officers in other courts.

The chief Clerk or Master of the King's Bench, on the Plea side, nominates and appoints in that court the Secondary, the two Clerks of the Paper, the Clerk of the Rules, the Clerk of the Bails and Postea's, the Clerk of the Doquets, and the Clerk of the Declarations; and yet the chief Clerk is but a Clerk still, tho' of the first Form.

The *Custos brevium* in the Common Pleas is the first officer in dignity in that court, is ap-

appointed by the Crown, and hath the nomination of one of the most considerable officers in that court, *viz.* the second Prothonotary; and yet the *Custos brevium* is no Judge of that court. The Prothonotaries in that court respectively name the Secondaries.

The King's Remembrancer in the Exchequer is appointed by the King, and takes his Oath of office before the Barons in open court.

The deputy Remembrancer is nominated by the King's Remembrancer, and takes the same Oath of office as the Remembrancer.

In the office of the King's Remembrancer there are eight sworn Clerks, who are the Attornies of the court in that office; these eight Clerks are all nominated, sworn, and admitted, by the King's Remembrancer. This *may* be call'd the exercising of judicial authority in the court of Exchequer; for Authors may use what terms they please, but no one will believe that this makes the King's Remembrancer a Judge in the court of Exchequer, or gives him authority to do any other judicial acts therein. It may as well be said of the King's Remembrancer, *mutatis mutandis*, as is said by the Author, concerning the Master of the Rolls, p. 46. *In this nomination and admission of officers, the King's Remembrancer is not subordinate to the Barons, but*

but his act is an unalterable act of the court; for he only hath a right to judge of the qualification of those officers, and to admit and put them into possession of their offices accordingly. And yet notwithstanding all this, the King's Remembrancer is but an officer of the court.

Each of the said eight sworn Clerks have the nomination of three Clerks under each of them respectively, who are not obliged to take any Oath, but practise in the names of their respective sworn Clerks.

The Master of the Office of Pleas in the Exchequer nominates four Clerks under him, who are the Attornies of the court in that office; these four Clerks are first sworn in the office before the Master of the office, who there administers the Oath to them, and then they afterwards take the same Oath again in open court.

These four sworn Clerks nominate under Clerks much in the same manner as in the King's Remembrancer's office.

The Clerkship of the court of Requests always belonged to a Clerk of the Privy Seal, and that Clerk disposed of the places of the three Attornies in that court. Lambert's *Archæion*, 230.

Now after these instances, and more that might be added, can any one imagine that because an officer of a court nominates, swears, and admits other officers, that therefore that officer is a Judge of that court? It is observable,

vable, that in the King's Bench, Common Pleas, and Exchequer, the offices of the court are for the most part in the gift either of the King, or of the chief Judge, or of the chief Officer of the court. If the puisne Judges of those courts have very little or nothing at all to do with the offices of the court; if the other's argument shou'd be true, that the nomination and admission of officers of the court, is an exercise of judicial authority, the puisne Judges would be hardly any Judges at all. The like observation may be made in Chancery, the nomination to the offices of the court belongs partly to the King, partly to the Chancellor, the Judge of the court, and partly to the Master of the Rolls, the chief officer of the court.

Our Author's second head for the proof of exercise of judicial authority by the Master of the Rolls on the common law side of the court of Chancery, is *the Proceedings in the Petty-bag office, according to the course of the common law.* The first instance he quotes for this is out of the Year-book 11 E. 4. 8. b. 9. a. *In an Audita Querela brought in Chancery to avoid an Execution upon a Statute Staple certified into the Petty-bag; the Master of the Rolls sat in Chancery (as the Author saith) without the Chancellor, and was assisted by Justice Choke, a learned Judge of*

† P. 42, 46.

that time; upon which occasion the Master of the Rolls said, We are in Chancery, where our power is to adjudge, not only according to law, but conscience: To which Judge Choke answer'd, In this case you are Judges according to the course of the common law: And then the Master of the Rolls said he wou'd consider of it till next Term. The words of the Book are, Et puis il dit que il voil estre avise tanque al prochain term, which is a plain evidence that the Master of the Rolls was then sitting in court as a Judge, and gave the Rule; for this is the Rule usually pronounced in the courts of common law upon such occasions, the substance of which is always enter'd on the Record of the Judgment, when the cause is continued over from one Term to another.

It is highly probable, and next to a demonstration, that in this Term, which was *Trim. 11 Ed. 4.* there was no Chancellor, and that the Master of the Rolls had then the custody of the Seals, and either alone, or calling to himself a Judge, had power from the Crown to execute the office of Chancellor; and if this be so, that will be a full answer to every thing that may be drawn from this case.

Robert Stillington, Bishop of Bath and Wells, was made Chancellor *20 June, 7 E. 4. anno 1467.* and was certainly so on the

12 May, anno 1470. 10 E. 4. The 9 Oct. following *Henry* 6. expelled *Edward* 4. and re-assuming the regal power, made *George*, Archbishop of *York*, Chancellor the 19 April following, which was 11 E. 4. anno 1471. *Edward* 4. re-gain'd the regal power, but it is next to demonstration that *Stillington* was not then Chancellor; for on the 3 July, 11 E. 4. which was about the time when the case in question happen'd, in a ^a Recognition of *Edward* Prince of *Wales* to be heir to the Crown, sworn to and sign'd by the Bishops and Lords, *Stillington* did not sign as Chancellor, but the last save one of the Bishops, by the name only of *R. Bathonien*; and as most of the Bishops received pardons from *E. 4.* after his resumption of the Crown; so the 25 Feb. 11 E. 4. the King granted a pardon to ^b *Stillington*, for all treasons and other offences, and for all outlawries, if any had been on those occasions pronounced against him; in which pardon, his additions and titles are particulariz'd, but he is not there once call'd Chancellor.

The case in question was, as said before, *Trin.* 11 E. 4. anno 1471. and if there was now no Chancellor, it follows, as it hath been proved, that there cou'd not be any exercise of judicial power in the court

^a Rym. ibid. p. 714.

^b Ibid. p. 736.

of Chancery, till a new Chancellor or Keeper was made, or some person specially authorized by the Crown; and therefore it is very probable that the custody of the Great Seal, and the Chancellor's power, was now committed to the Master of the Rolls, or to him calling a Judge to his assistance, in like manner as had been done before in this reign: As *Kirkham*, Master of the Rolls, had the Seal in the absence of the Chancellor, 3 & 4 E. 4. and authority from the King to execute justice according to the course of the Chancery, calling to himself *Richard Walton* and *Richard Fryston*, Clerks of the Chancery. And the 7 E. 4. in the vacancy of a Chancellor, the same *Kirkham*, Master of the Rolls, had the Seal, and also authority from the King to determine causes in Chancery; and if any difficulty arose, to take the advice and counsel of the King's Justices. And this well suits with what the Master of the Rolls himself says in this case: *We are here in a court of Chancery, in which our power is to judge according to conscience as well as law*; not limiting this power to himself, but including also *Choke*, who I think was the only Judge then present: And if the Master of the Rolls had not then this power, I do not know how the Author can make Justice *Choke* an assistant to the Master of the Rolls at this time; for tho' the Chancellor ever was,

and

and still is, as the Author allows in p. 57. intitled to the assistance of the Judges in any cause depending in Chancery, yet I never understood that the Master of the Rolls is so intitled. This therefore being the state of the court of Chancery, when the case in question happen'd, makes it evident by what authority the Master of the Rolls acted, and gives a plain and easy solution of this whole matter.

But suppose it shou'd be taken that there was a Chancellor in being, yet even then the case doth not warrant what it is produced for. The case was a *Scire facias*, to supersede an Execution on a Statute Staple against three, on a *Scire feci* return'd; two appear'd, the third made default, and this held to be the default of all; whereon judgment was given to supersede the Execution, and then the Plaintiff pray'd damages, which was in it self a very hard demand, especially against the two who appear'd; but Choke being of opinion that damages ought to be given against all; thereon the Master of the Rolls said, *Sir, altho' by the law damages shall be adjudged against both, yet we are here in the Court of Chancery, where our power is to adjudge not only according to law, but according to conscience.* To which Choke answer'd, *In this case you are Judges according to the course of the common law.* Here was a difference of opinion between the Judge

and the Master of the Rolls, both of them sitting in Chancery, a court both of law and conscience; the Judge was of opinion in a very hard case, that damages shou'd be given, because he thought the strict law to be so; the Master of the Rolls thought whatever the law might be, *yet we*, in the plural number, *i. e. Choke* and he, *are now in the Court of Chancery, where our power is to judge according to conscience as well as law*; to which *Choke* replied, that *in this case they were only Judges at law*. And then the Author introduces the Master of the Rolls as saying that *He* wou'd be advis'd or consider of it against next term; but whosoever will observe the ^a words of the case transcrib'd in the margin from the original, cannot be so clear as the Author is, that the Master of the Rolls was the person who said *he wou'd* be advis'd; for the next antecedent to the word *He*, is *Choke*; And then in the Author's language it was

^a Le Master des Rolles dit, Sir, Comment que par le ley damage sera adjudg vers ambid, Unc fumus icy en Court de Chancery, en quel nostre' power est d'adjudger auxi bien solongue le ley, &c. *Choke* En c' case vous soyez & estes Judges solouque de cours del common ley. Et si error soit en vostre Judgement, il sera redresse par le Parliament & issuit est en Attachment de Trns ou det vers un' des ministres de cest Court, &c. par que il covient adjudger solongue le common ley, & puis il dit qu' il voile estre avise tanque al prochein Terme.

Choke that sat in court as a Judge, and gave the Rule; and if there was at this time a Chancellor in being, I do not see how the several parts of this transaction can be reconciled, without supposing that both *Choke* and the Master of the Rolls sat there by delegation.

The next authority cited by the Author under this head, is the Book-case of the 13 E. 4. 8. a. which was this; *Upon a traverse to an office found for the King, and return'd into the Petty-bag, issue was join'd, and a Venire facias to try the issue was awarded out of Chancery, returnable in the King's Bench; in the vacation time the Attorney General came to the Master of the Rolls, and said he would change his issue, and pray'd a Superfedeas to the Venire facias: But the Master of the Rolls did not grant it, whereon the court was mov'd about it the next term.* From hence the Author infers, ^a *that it was then taken for granted that the Master of the Rolls had judicial authority, for otherwise the Attorney General would not have apply'd to him, and pray'd a Superfedeas to a Venire facias, which is a judicial process.*

By this way of arguing, every Philazer and Prothonotary have judicial power in the Common Pleas; for all the Writs made out in that

^a P. 48.

court, are made out by the one or the other of those officers: Supposing a person shou'd make out in his own cause, an improper Writ, and before the return of it shou'd come to the officer in whose office it was made out, and desire him to seal a *Superse-deas* to it, what wou'd the officer do in such a case? If it appear'd to be a plain case, he wou'd let him have his Writs; if it did not appear to be a plain case, he wou'd bid him move the court the next term. This is all that is in this case; the Master of the Rolls is the Master of the Petty-bag office, where the law Writs are made out, and the clerks there are his clerks, and he hath a fee at this day for every *Venire facias* issuing out of that office. The Attorney General came in the vacation time to the Master of the Rolls, to desire that he might have a *Superse-deas* to his own Writ of *Venire*, because he wou'd change his issue; the Master of the Rolls either doubted whether this cou'd be done, or conceived it cou'd not be done; for which doth not appear in the Book, and thereupon the court was moved next term, who were of opinion, it cou'd not be done.

The next instances under this head, are ^b *making of Orders for amending Writs of Scire facias, Declarations, and other Pleadings giving times to plead, and the like.*

The Author hath not here cited any particular instances of such interlocutory Orders; but if he had produced any such, they relate to the Proceedings in the Petty-bag office, where the Master of the Rolls is the chief clerk, and is no more than what the chief clerks in other courts of law have in the like particulars sometimes exercis'd or assum'd.

The Author goes on in p. 49. and saith, *There are some other cases in the Tear-books not already cited, viz. 12 E. 4. 13. b. 1 E. 5. 8. a. 1 H. 7. 27. b. 27 H. 8. 14. b. wherein the Master of the Rolls is mention'd, as well in matters of law, as of equity, in the same manner with the Judges.*

If he be only assisting the Chancellor, then he is not a Judge with the Chancellor, and if the manner of the Judge's assistance doth not make them Judges with the Chancellor, no more doth it make the Master of the Rolls so.

The Author goes on in the same place, that *in the 1 H. 7. 27. b. Upon a question in Chancery concerning Livery granted to the King's Tenant, the Chancellor adjourn'd it propter difficultatem, into the Exchequer chamber, before all the Justices and the Master of the Rolls.* And then remarks, that *upon this case it is proper to take notice that no cause was ever adjourn'd into the Exchequer chamber before any person not being a Judge; nor is there any instance, that he can find, of*

the Chancellor calling to his assistance in causes in Chancery, any person not having judicial authority, in the same manner as he doth the Judges. From whence, I suppose, the inference left to be made by the Reader is, that seeing this cause was adjourn'd into the Exchequer Chamber before the Master of the Rolls, as well as the Judges, and the Master of the Rolls assists the Chancellor in hearing causes in Chancery, that therefore he must be a Judge too; but the Author is mistaken in both his premises, for causes have been in the Exchequer chamber before those who have not been Judges, and the Chancellor hath been assisted in Chancery by those who are not Judges. There are several instances of both, I shall only mention one or two of each: As to the first, that causes have been in the Exchequer chamber *propter difficultatem*; before those who were not Judges, as well as those who were, these are the very words of *Keilway*: Memorandum, *That in the Exchequer chamber at Westminster, in presence of all the Justices and Serjeants of England, and of all the Barons of the said Exchequer, assembled for the same cause; Blage, one of the Barons of the said Exchequer, shew'd and mov'd a question depending before the said Barons.* And the 15 H. 7. 14. *In the Exchequer chamber, before all the*

Justices and Serjeants there assembled, the Chancellor of England demanded their advice in a matter, and rehears'd the case, &c. And as to the second, that the Chancellor hath been assisted in hearing causes in Chancery, by those who were not Judges, it is reported in *Fitzherbert's Abridgment*, *Fit. Subpœna* 15. That the Chancellor gave his opinion in a case in equity, by advice of the King's Serjeants. And in the Register *Mich. 6 E. 6. 17. b.* there is this Order, *West v. Robyns*. This matter is appointed to be heard the morrow after the election of the Sheriffs, before the Lord Chancellor, the Lord Treasurer, and others; and there is the like Order in the same Register, between *Gold and Damstead*, *Ibid. 20. b.* and in *Dy. 197. b.* it is reported, that the Chancellor gave judgment to reverse Letters Patents, by the advice of the Justices and King's Serjeants. So that the Author being mistaken in both his premises, the inference that is insinuated falls with them. But if it were all true, what is it to this purpose? Is it to be inferr'd that because the Master of the Rolls assists the Chancellor in Chancery, and goes with him into the Exchequer chamber, to have the advice of the learned there, that therefore he is a Judge in Chancery with the Chancellor?

If the Author cou'd have given any one instance of a judgment given in a law Proceeding in Chancery, by the Master of the
Rolls,

Rolls, it wou'd have been much more material. Where the cause goes to issue, and is determined by verdict, that issue is try'd in the King's Bench, and the judgment is given there; but where the cause goes to a Demurrer, there the judgment is given in Chancery. And the Author saith, *^d Tho' for some time past the Chancellor only hath given judgment upon Demurrers, yet there are not wanting footsteps of the Master of the Rolls's having authority in that case.* The Reader will see, in the Author's discourse, what those poor footsteps are; it is not worth the while to trouble him with a repetition of them: But whereas the Author saith that *for some time past* the Chancellor only hath given judgment upon Demurrers, that is an insinuation that there *was* a time when it was otherwise; whereas there is no time past when it was otherwise: And the Author cannot give any one instance in *any time* past where the Chancellor alone did not give judgment upon Demurrers.

The Author's third head of the Master of the Rolls's exercise of judicial authority on the common law side of the court of Chancery, is, *the cancelling or vacating the enrollment of Letters Patents, and other Records of the court*; and to make this the more considerable, a saying of the Lord chief Justice

^d P. 48.

^e P. 50.

Coke, in 4 *Inst.* p. 88. is quoted, *That it is the highest point of the Chancellor's jurisdiction to cancel the King's Letters Patents under the Great Seal, and damn the enrollments thereof, by drawing strokes thro' them like lattices.*

This saying of Sir *Edward Coke* can only be meant of a cancellation by judgment, and not of a cancellation of course, as most are in Chancery.

There are, or shou'd be, several things enrolled in Chancery, which are no matters of judgment; as all Leases, or Letters Patents, for years or lives, made by the King of his lands, were heretofore enrolled in Chancery; when a Tenant surrender'd an old Lease, and took a new one, there was anciently a *vacatur* or a cancellation enter'd of the old Lease; for which *vacatur*, in Sir *Thomas Egerton's* time, as it is in the Author, p. 52. the Masters claim'd a Fee, (tho' then of late years it had grown out of use,) of six shillings and eight pence, but the Jury apprehended it to appertain either to the Lord Keeper, or Master of the Rolls.

It was on a Surrender of this kind that the *vacatur* mention'd by the Author p. 50. was order'd to be enter'd by Sir *William Cordell*, Master of the Rolls; he accepted of a Surrender of Letters Patents, and so may^f every other Master in Chancery, and so they

^f Dy. 176.

now do whenever there is occasion; and there is no need either for them or the Master of the Rolls to exercise their judgment on the validity of such Surrenders. It is at the peril of the Surrenderers, or of those who are to have any benefit by that Surrender, to see that the Surrender be valid and effectual; their business is to take the Surrender, and when that is done, the entring of the *vacatur* on the enrollment of the Deed or Patent surrender'd, is merely ministerial, and as much of course as the entry of satisfaction on Record of a judgment, which is done by every Clerk or Attorney of the court, without the special direction of the court for so doing: And so it was apprehended in the case of vacating of these Patents by the court of Exchequer, that it might be done by the ³ officers of the Chancellor, as well as by himself.

As for the vacating of Recognizances, these are appendixes to the causes wherein they are given, and when the end is answer'd for which they are given, they are almost of course discharg'd by an interlocutory order.

The Author's fourth and last head of the exercise of judicial authority on the common law side of the court of Chancery, is the *ordering or directing Writs to be made out by the Cursitors.*

³ Case of the Church-wardens of St. Saviour's Southwark,
10 Co. 67. a. & b.

^h P. 42, 53.

The first ⁱ instance the Author mentions under this head, is out of the Register of Writs, fo. 7. where it is said, ^k *When any one impleads another in the county court, or in the Lord's court, and it is proceeded so far that the Tenant puts himself upon the grand assize, then the Tenant may come to the Chancery to the Keeper of the Rolls, and shew by what words he put himself upon the grand assize, Et fiat ei breve de pace usque ad primam assisam: Which words amount to this, ^l that he shall have the Master of the Rolls's fiat for such a Writ.*

The words of the Register are cited in the margin, and the Reader will thereby see whether this be a just translation; if it be, the same will serve for the Masters in the like case, for by the rule in the same Register Original of Writs, if a man going beyond Sea is desirous to have a Writ *De Attornato Generali*, ^m *unless there be a privy Seal, he*

ⁱ P. 53.

^k Quando aliquis implacitaverit alium in curia Domini sui vel in comitatu, & ibi in tantum procedatur quod tenens ponat se in magnam Assisam, tunc veniat idem tenens in Cancellar' Dom' Regis ad Custodem Rotulor' & ostendat ei per quæ verba posuit se in Magnam Assisam & fiat ei breve de pace usque ad primam Assisam.

^l P. 54.

^m Non conceditur nisi pars quæ facere voluit Attornatum, venerit coram aliquo Magistrorum Cancellariæ in propria persona, nisi fil' per billam de privato sigillo. — Et debet Indorsari sic per unum Magistrorum, *Johannes Franke* Clericus recepit Attorn' ipsius Constituentis usque ad adventum ipsius in Angliam. Reg. Orig. 21. a.

must come before one of the Masters in Chancery in proper person, and the Master in Chancery must indorse the acknowledgment on the back of the Letter of Attorney, and that amounts to this, that he shall have the Master's fiat to take out the Writ.

I need not here re-mind the Reader that it is proved in the 3d chapter of this Treatise that it was the ancient business of the twelve Masters in Chancery, whereof the Master of the Rolls is the first, to order and direct proper Writs to be made out for parties according to their cases, and that there was no distinction in this matter between the Master of the Rolls and the other Masters. In the Ordinances explain'd by Mr. Croke, upon the estate of the Chancery Court, *anno* 1554. he writes, *That the Masters of the Chancery may make all kinds of Patents, Commissions and Writs*, except such as are there mention'd to be excepted: To which may be added, that it appears by the Register. that there were several rules made in Chancery about the manner of giving or issuing of several Writs; and as to such finable Writs mention'd by the Author in p. 55. where the Fines were equally divided between the Lord Chancellor and the Master of the Rolls, there is an obvious reason why particular care was taken that those Writs shou'd be given by the Chancellor or Master of the Rolls, whilst others were left to the Masters in common;

so that the ordering or directing of Writs is no more a proof that the Master of the Rolls is a Judge of the court, than that the Clerk of the Papers is *one* of the *Justices* of the King's Bench, by constantly inscribing in the margin of the Paper-Books to this effect; that unless the Defendant bring in that Paper-Book to be enroll'd by such a time, *fiat breve*.

The Author ⁿ writes, that in the Ordinances publish'd by the Lord Keeper Egerton the 24 May, 1596. *It is said, that no Writs of ne exeat regno, prohibition, consultation, &c. should pass without the hand of the Lord Keeper or Master of the Rolls; on which the Author thus reasons, ° As these Writs must be moved for, and it is a matter of judgment whether they shall be granted or not, it is manifest, that at that time the Master of the Rolls cou'd grant such Writs only by virtue of his office; for Egerton had not then, or at any other time, whilst he was Master of the Rolls, any special commission for exercising jurisdiction in the court, but acted judicially all along, by virtue of his office.*

It is true the Master of the Rolls cou'd by the said Ordinance of Sir Thomas Egerton, pass and sign these Writs as well as the Chancellor; and the other Masters, by their general authority, did the same, before that restriction was laid upon them by the Chan-

ⁿ P. 54.

° Ibid.

cellor: And the same restriction being afterwards laid by the Chancellor, upon the Master of the Rolls himself, viz. by the eighty fifth Ordinance of Sir *Francis Bacon*, anno 1618. *That none of these Writs shall pass without warrant under the Lord Chancellor's hand*, the Master of the Rolls hath not since sign'd these Writs, but they are at this day sign'd only by the Chancellor. So that it is plain that the ordering or directing of Writs by the Master of the Rolls, made him no more a Judge of the court, than it did the other Masters or the Curfitors.

The Author proceeds, in p. 55. *That as the Masters of the Rolls have order'd Writs to issue, so they have order'd them not to issue, as in the 27 H. 6. there is this Entry:—*Nul-lum fiat breve de supersedendo, quia securitas minus sufficiens, per Mandat' Custod' Rotu-lorum.

The ancient form in Chancery to have a *Supplicavit*, or Writ of Surety for the Peace, was to make an affidavit in Chancery, *⁊ before a Master in Chancery*, and then such a Writ issued; and if the party against whom it issued, wou'd have a *Supersedeas*, the method was to find surety in Chancery; In this case the Master of the Rolls wou'd not permit a *Supersedeas* to go, because the surety

⁊ F. N. B. 79. b.

offer'd was not sufficient; the other Masters may, and do take such surety as well as the Master of the Rolls, and by consequence must, as well as he, judge of the sufficiency of such security; and when such surety is once given, a *Supersedeas* follows thereon: But this no more makes either the Master of the Rolls or the other Masters of Chancery, Judges, than a Prothonotary is made a Judge by granting a *Supersedeas* upon the Defendant's putting in of Bail, or than the Clerk of the Errors is one, who on allowance of a Writ of Error doth of course grant a *Supersedeas*.

The Author hath spent the greatest part of the third, fourth, and fifth sections of his discourse, to take off the force of the argument against the inherent jurisdiction of the Master of the Rolls, arising from the King's *special commissions* authorizing him to hear and determine matters and causes in Chancery, and to that end hath employ'd the most part of the said three sections, to prove, *that the Master of the Rolls exercis'd judicial authority on the equity side of the court of Chancery, before any special commission for hearing and determining of causes in the absence of the Chancellor ever issued; that after such special commissions began to be issued, the Master of the Rolls exercis'd judicial authority on the equity side of the court, during the successive intermissions of such commissions, and likewise in all things did judicial acts not warranted by those commissions, whilst they were in*

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force: And that the Chancellors have from time to time carried judicial acts of the Master of the Rolls, done by virtue of their office, into execution by the Great Seal, and grounded judicial acts of their own, upon such acts of the Masters of the Rolls, and in other instances affirm'd the validity thereof.

Some of the citations and authorities produced by him for this purpose, have been already particularly consider'd, and others of them which contradict the matters in this treatise, shall in this chapter be examined; and as to the rest of them, that I may not be tedious, this general answer may be given, that supposing them to be all truly stated, and that none of them are either mistaken or misapplied, as I think some might be shown to be, yet they do not prove that those judicial acts were done by the Master of the Rolls by virtue of his office: Supposing they do prove that he did not do them by virtue of, or under the commission, yet they do not prove that he did not do them as an officer or minister of the court, by delegation of authority from the Chancellor. If he did not act by *one* of these authorities, it doth not follow that he did not act by the *other*.

By what hath been said in this Treatise, it appears, that the Master of the Rolls hath *two* lawful ways of exercising judicial authority on the equity side of the court of Chancery; the *one* by immediate commission, and authority

authority from the Crown, the *other* as an officer of the court, by communication of authority from the Chancellor.

It hath been proved, that by the latter method he and the Masters had, by the ancient Ordinance of the court, power to make interlocutory Orders, which in fact they did; and tho' the Masters have discontinued the exercise of that power, yet that doth not give a better right to the Master of the Rolls who hath continued it. It hath been likewise proved, that neither the Master of the Rolls, nor any other Master, can make a *definitive sentence or final decree*; but yet a method was introduced for the Chancellor to refer causes to be *heard and determined* by the Master of the Rolls, and the other Masters, who made their report to the Chancellor; and if no just cause was alledg'd against their determinations, the Chancellor *confirm'd* and *sign'd* them, and so made them his own Decrees and Judgments; and thereupon they were enroll'd amongst the Decrees and Judgments of the court.

Now if the *judicial acts* at any time done by the Master of the Rolls on the equity side of the court of Chancery, be *warranted* by either of these methods, there is no need to recur to the supposition of another Judge, or to an inherent original right in the Master of the Rolls, by virtue of his office, which are *new things*, not till lately heard of.

Supposing it be made out never so clearly, and I may say with much more conviction and strength than by the Author himself, that the Master of the Rolls did exercise judicial authority on the equity side of the court of Chancery, *before* any special commission for hearing and determining causes in the absence of the Chancellor issued, all that this proves, is, that the Master of the Rolls did not exercise that judicial authority under a commission, but doth *not* prove that he *did not* exercise it *by* or *under* his *other* right; and if he did it by *either* right, it was sufficient for the Great Seal to carry such acts into execution, and to ground other judicial acts thereon.

Again, supposing that it be made out clearly by the author, that *after* special commissions began to be issued for hearing and determining of causes in the absence of the Chancellor, the Master of the Rolls did exercise judicial authority during the successive intermissions of such commissions. This only proves that he did not do those acts under these commissions, but it doth *not* prove that he *did not do them* by *his other* power, as an officer under the Chancellor, by authority derived from him; many of the instances before-cited prove the *affirmative* that he did so.

Once more, supposing in the next place that the Author hath proved that the Master

of the Rolls hath in all times done judicial acts not warranted by these commissions, *whilst they were in force*, this doth not prove that the Master of the Rolls did not do them by the *other branch* of his authority, *viz.* by *communication* of authority from the *Chancellor*, as an officer of the court; the not doing them by the *one* doth not prove that he did not do them by the *other*; and if he did them *either way*, it was sufficient for the Chancellors to carry such judicial acts of the Master of the Rolls into execution, and to ground judicial acts of their own thereon.

Interlocutory Orders made by the Master of the Rolls, may, if the parties think themselves aggrieved thereby, be complain'd of to the Chancellor, who may *confirm*, *discharge*, or *alter* them; but if no complaint be made against them, they become *his* Orders; and Orders of Court, and Writs of execution may be taken out thereon, without farther application; but whether such Orders be made under the commission, or under the authority originally imparted by the Chancellor, it is the same thing to him, and to the court.

As for Decrees made by the Master of the Rolls, whether under the *commission* or by *delegation* from the Chancellor, they must in either case be sign'd by the Chancellor, and made his Decrees, before they can be

enroll'd amongst the Decrees of the court; and if any Decrees made otherwise by the Master of the Rolls, have been sign'd by the Chancellor, it is probable that it hath been done by inadvertency or surprize, or from a *trust* and *reliance* that whatsoever came to him sign'd by the Master of the Rolls, was *rightly* done, according to the *due* course; and this I believe was the case of the present Lord Chancellor, who, as the Author saith, p. 122. *hath sign'd several Decrees made in his Lordship's own time, by the Master of the Rolls sitting alone at the Rolls*; because, as I have heard, when his Lordship was informed thereof, he then stopp'd the signing of such Decrees till he had the opinion of my Lords the Judges touching their validity, and sent to them for their opinion thereon.

This may suffice for a general answer to the contents of the Author's three last sections; but inasmuch as the Author hath therein interwoven some matters which contradict what hath been advanced in this Treatise, or seem so to do, I shall beg the Reader's patience for a more particular consideration of those matters.

In the 2d chapter of this Treatise, p. 43. one reason made use of to prove the Chancellor to be sole Judge in equity, is, that all Bills for relief in equity are directed and ad-

dress'd to him: But the Author ⁹ affirms, *That Bills in Chancery have anciently been directed to the Master of the Rolls, praying process and relief.* It is indeed very anciently, the most modern precedent produced by the Author, p. 66. being very near two hundred years old.

But to follow our Author in the proof of his assertion, *There are, saith he, no Bills in Chancery found amongst the Records, higher than the reign of King Henry 6. and in the Bundles of the Tower of that reign, and of the reign of E. 4. Bills are now extant directed to the Master of the Rolls.*

That there are some few such Bills directed to the Master of the Rolls, is true; but the Master of the Rolls, to whom such Bills were directed, *was at the same time Keeper of the Great Seal;* and several of those Parchments which the Author *affirms* to be *Bills*, are *not Bills*, both which will be presently shown.

The Author goes on, p. 63, 64. *The most ancient of those Bills are in the nature of Articles, upon which the Plaintiff prays that the Defendant may be examined in the Chancery, either before the Chancellor or the Master of the Rolls, as his Bill happens to be directed to the one or the other; and the Defendant's answer is sometimes call'd his confession, and sometimes his examination; the first which I have been able to find, is anno 14 H. 6. directed to the Bishop of Bath, then Chancellor,*

and prays that the Defendant may be examined in the King's Chancery before him. 27

H. 6. is a Bill directed to the Master of the Rolls, which concludes, " These be the Points " and Articles which John Mathew, Squier, " prayeth you, that Robert Borner may be examined on before you in Chancery.

There are four other instances of Bills directed to the Master of the Rolls, found of that reign, besides a Bill directed to the Earl of Salisbury, Lord Chancellor, which affords a proof of the same kind; for therein the Plaintiff sets forth, that he had been before the Master of the Rolls for the same matter, and the Defendant had been examined thereupon.

These are the Author's instances of Bills directed to the Master of the Rolls in the reign of H. 6. but this whole paragraph is founded upon a mistake, that the Articles on which the Plaintiff prayed that the Defendant might be examined, were Bills; whereas they are *Interrogatories* on Bills, and the Defendant's confession or examination was an answer to those *Interrogatories*.

The Chancellor, as Judge of the court, as the Barons of the Exchequer do in effect to this day, might, if he thought fit, examine the Parties himself, and that is all that can be proved from the authority cited of 14 H. 6. which is no Bill, nor any thing like it; but thus begins on the top, anno 14 H. 6. then follows, Thomas Cotes, examined in the Chancery

Chancery by the full reverend Father in God Bishop of Bath, Chancellor of England, the 3d day of November, and year of the reign of King Henry the sixth, after the conquest, 14. saith, that, &c. and so goes on to the end of the deposition.

But the officer that was generally appointed by the Chancellor to be *Examiner* of the court, was the Master of the Rolls: Many instances of this might be produced; to avoid prolixity, I shall only mention one amongst these bundles, in the said reign of *H. 6.* *William Brykele*, 11 *H. 6.* brought his bill about a parcel of wine, as it seems, against *John Goodier*, who being examined, said, upon his oath, that *John Trefry* and *John Salter* had some of the wines, and thereupon the 4 *Nov.* 12 *H. 6.* they are examined by *John Franke*, Master of the Rolls; and the beginning of the examination upon the Record, is thus: *Be it remember'd*, that *Thomas Trefry*, the 4th of *November*, in the year of King *Henry the 6th*, the twelfth, by assignment of the Chancellor of England was committed to *John Franke*, Clerk of the Rolls of the King in the said Chancery, to be examined of certain Articles, &c.

This office or duty of taking Examinations, was, in succession of time, appropriated to the Master of the Rolls, who came to be the sole examiner in the court; and afterwards,

wards, when Examinations multiply'd, other persons were appointed under him for his assistance; which is the reason why at this day the two Examiners of the court are in the gift and nomination of the Master of the Rolls, because they were originally his servants, appointed for his ease and help in examinations.

Now these which the Author calls *ancient Bills*, in the nature of *Articles*, were not *Bills* but *Articles*, or *Interrogatories* on *Bills* before preferr'd, and were exhibited to the Master of the Rolls, because he was the examiner. The Bill was preferr'd to the Chancellor, but the *Articles* which our Author mistakes for *Bills*, were exhibited to the Master of the Rolls, who was the examiner, as the *Points* or *Interrogatories* on which the party was desired to be examined; it being the usage of those days to examine Defendants as well as Witnesses, upon *Interrogatories*.

In the particular instance of *Mathew v. Borner*, cited by the Author, it is plain that the whole Record is not preserved, being lost in the ruins of time; and that which is preserved, is only the *Articles* or *Interrogatories*, and the examination thereon. All that remains is this, *To my worshipfull Master, the Master of the Rolls*:

These be the Points and Articles which that John Mathew, Squier, prayeth you, that Robert

bert Borner of Sedelescombe *may be examined on before you in the Chancery.* First, the said John Mathew prayeth you that the said Robert Borner *may be examined whether that the said John Mathew were ever sole seisd in his demesne, as of fee of the lands and tenements which late were John Beek's in Sedelescombe within the county of Suffex.* Item, he prayeth that the said Robert Borner *may be examined if that the said John Mathew, sole seisd of the said lands and tenements, made any feoffment unto my Lord of Suffolk, my Lord of Salisbury, Sir Roger Fines, Sir William Gould, Priest, David Daniel, and others, of the said lands and tenements.* And then there is annex'd or tack'd to it, another Parchment, intituled, *This is the Answer of Robert Borner;* which on the face of it appears to be his answer to these two Articles or Interrogatories.

If this whole Record had been printed, the most willing Reader cou'd never have taken this for an original Bill, much less that this is any proof of what it is brought for, viz. an *instance of an ancient Bill directed to the Master of the Rolls, praying process and relief.* There is neither *process* nor *relief* pray'd by it, but it is only a bare examination on Articles before the Master of the Rolls, who was then the Examiner of the court; and according to the course of that time, when Bills were regularly exhibited, there must have been a Bill,

Bill, tho' it be now lost, whereon that examination was founded.

The nature of the thing speaks it; besides, in the same bundles remaining of that King's reign, there happens to be preserved the whole, or sufficient of the proceedings, in one or two instances to clear this matter.

In those days there was no enrollment of proceedings, which came in long since; but the Bill, Answer, Replication, &c. in each cause, consisting of several Parchments, were preserved amongst the Records of the court, and frequently stitch'd together, and on the back of the Bill was commonly indorsed the Decree.

In the bundle of Chancery Parchments remaining of the reign of *H. 6.* there are four Parchments stitch'd or tack'd together.

In the first is contain'd a Bill brought by *John Adie*, against *Elene Deer*, Executrix of *Thomas Brown* and *Thomas Bledlowe*, to be reliev'd against a Bond on suggestion, that it was given for usury: The Bill is directed, *To the most reverend Father in God, and my good and gracious Lord, the Archbishop of York, Chancellor of England.* In the second Parchment is the answer of *Elene Deer* and *Thomas Bledlowe*, to the Bill of *John Adie*. In the third Parchment is the Replication of *John Adie* to the answer of *Elene Deer* and *Thomas Bledlowe*. In the fourth Parchment is a Witness examined for the Defendants, the
title

title of which examination is, *This is the deposition of John Barret afore the Master of the Rolls, for Elene Deer and Thomas Bledlowe.*

In the bundles 29 H. 6. there are three Parchments tack'd together; one is entitled, *This is the answer of Thomas Goly to the bill of Francis Mitchell.*

In another of the Parchments is the examination of *Thomas Goly*, before the Master of the Rolls, the beginning of which is thus; *Please it you Master of the Rolls, for to examine Thomas Goly, &c.*

The third Parchment contains the examination of *Thomas Goly*, and is thus entitled; *This is the examination of Thomas Goly, unto the Articles put against him in the Chancery by Francis Michell.*

If this Parchment containing the Answer, and reciting the Bill, had been lost, there cou'd hardly have been any colour to have mistaken these applications for examinations to the Master of the Rolls, to have been *original Bills*; but now that in some instances the Bills appear, this makes it strange how this Author cou'd ever fancy examinations upon Interrogatories or Articles before the Master of the Rolls, who was Examiner of the court, to be *original Bills*, wherein *process* and *relief* is pray'd; whereas there is not any one instance in these Interrogatories (the Author's *suppos'd Bills*) of any such thing pray'd.

The four other instances of Bills directed to the Master of the Rolls, affirm'd by the Author to be found of that reign, are not particularly named by him, and so cannot receive a particular answer; but I can give him this general answer, that if he will vouchsafe once more to look into those Chancery bundles in the Tower, from whence he takes these four instances, he will not find they are Bills directed to the Master of the Rolls, praying process and relief; but *Articles* or *Interrogatories* upon Bills exhibited to him, to examine the Parties upon: And it is this mistake that hath probably led the Author to affirm, *that the most ancient of these Bills are in the nature of Articles, upon which the Plaintiff prays that the Defendant may be examined in the Chancery, either before the Chancellor, or Master of the Rolls, as his bill happens to be directed to the one or to the other; and that there are bills remaining of the reign of H. 6. directed to the Master of the Rolls, when Stoppenden and Kirkby were successively Masters of the Rolls, who were never Keepers of the Great Seal; and that therefore no doubt could arise as to them, in what capacity such bills were preferr'd to them.*

If this mistake did not lead him into this unwarrantable assertion, he best knows what did; I hope it was this mistake; for there was

^{*} Discourse, p. 63.

[†] Ibid. 65.

no such thing at that time, as a *casual direction of a Bill*, according as it happen'd, either to the Chancellor, or Master of the Rolls. There are no Bills remaining in that reign directed to the Master of the Rolls, when either *Stoppenden* or *Kirkby* were Masters of the Rolls, or to any Master of the Rolls, who was not at the same time Keeper of the Great Seal, as I shall immediately shew, when I come to his instances in the next reign of *E. 4.* only before I come to that, I wou'd take notice of one instance more, produced by him, in the reign of *H. 6.* and that is, a bill directed to the *Earl of Salisbury, Lord Chancellor*, which, the Author saith, affords a proof of the same kind; because therein the Plaintiff sets forth that he had been afore the Master of the Rolls for the same matter, and the Defendant had been examined thereupon.

This Bill it self is a Bill to the Chancellor, brought by *Thomas Cole* and *Margaret* his Wife, against *John Vincent*, complaining of a wrongful detainer of certain lands from the Wife; and refers to inquisitions upon commissions issuing out of Chancery, and relates another fact; *And also that the said John Vincent divers times* had been afore the clerk of the Rolls for the said matters, where he hath been examined thereof, and for excuse answered that he enter'd as a tenant, and that the said matters had been put to arbitrement, and especially now late, at the desire and instance

stance of the said clerk of the Rolls, was put to the award and rule of Justice *Portington*, and then go on and complain of other matters, and pray relief.

All that is contain'd in this Bill to the Chancellor, pertinent to the Author's purpose, is this, that here is a relation of a past fact, that the Defendant had been divers times afore the clerk of the Rolls for the said matters, *where he had been examined thereof*: The Bill doth not relate how or in what manner, or on what process, the now Defendant came formerly before the Master of the Rolls; it was probable it was according to the course of those times, upon an *examination* grounded upon a *precedent* Bill; but that this is a proof that it was on a *Bill* directed to the Master of the Rolls, praying *process* and *relief*, is a mere imagination of the Author's, without any thing to support it.

The Author goes on, and saith, p. 64, 65. *That in the reign of Edward 4. there are found several bills directed to Kirkham, then Master of the Rolls, praying process and relief, in the same manner as bills directed to the Chancellor: And tho' it must be admitted that Kirkham was sometimes Keeper of the Great Seal during that reign, for short spaces of time, upon the removal or absence of a Lord Chancellor, amounting but to three months in the whole; yet that can afford no real objection against this proof, that bills were directed to him*

him as Master of the Rolls: Because it appears that when he had the Seals in his hands, the bills are directed to him by the stile of Keeper of the King's Great Seal, which preserves the distinction between such bills as were directed to him in one capacity, and such as were directed to him in the other.

In answer hereto, amongst the Chancery bundles in the Tower there are 25 Parchments stich'd and tack'd together, number'd 1, 2, and so on to 25, inclusive; N^o 22. is an answer; N^o 24. is a Bill to a Chancellor: The remaining 23. are Bills directed for the most part, to *Kirkham* by name, whereof 15. are directed to *Kirkham*, by the name of Keeper of the Great Seal, and of the Rolls; two are directed to him by the name of Keeper of the Great Seal only; one to the Right worshipful Sir Keeper of the King's Rolls of his Chancery, and of his Great Seal, without naming any particular person; four to the Master of the Rolls, without naming any particular person; and one to Master *Robert Kirkham*, Master of the Rolls. Besides this, there are in those bundles, in loose Parchments, ten other Bills, the greatest part whereof appears to have been 6 & 7 E. 4. directed to Master *Robert Kirkham*, Clerk or Master of the Rolls, and Keeper of the King's Great Seal; and one other of the 6 & 7 E. 4. directed to Master *Robert Kirkham*, Keeper for the time of the King's Great Seal. Now at this time it is most certain,

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that *Kirkham* was *Keeper* of the Great Seal, as well as *Master* of the Rolls; Seventeen of these Bills are expressly directed to him, as *Keeper* of the Great Seal; one to the *Keeper* of the Great Seal, without naming him; and because the other five are directed to the *Master* of the Rolls, without naming him *Keeper*, it doth not therefore follow that he was not *Keeper*; for as those Bills which are directed to *Kirkham*, under the sole denomination of *Keeper* of the Great Seal, do not exclude him from being *Master* of the Rolls, at the same time, as he certainly was; so these Bills in the same bundle, which are directed to the *Master* of the Rolls, under that sole denomination, do not exclude him from being *Keeper* of the Great Seal at the same time. And it is evident, from an *internal character* of the Bill directed to *Kirkham*, *Master* of the Rolls, without specifying any other title, that he was at *that time* likewise *Keeper* of the Great Seal; for in the beginning of that Bill the Plaintiff sheweth unto his good Lordship, and in the conclusion the prayer is, *May it please your good Lordship to consider the premises*: Which expressions cou'd not be us'd to him, unless he was at that time Lord *Keeper* of the Great Seal: For I do not remember that it was the language of those days to call the *Master* of the Rolls, *his Lordship*.

There is but one instance more alledg'd by the Author, of Bills directed to the *Master*

ter of the Rolls, and that is in p. 66. *That in one of the bundles in the Tower, in the reign of King Henry the 8. is a cross bill directed to Crumwell, Master of the Rolls, reciting an original complaint to have been presented to him concerning the same matter; and upon the back thereof is endors'd, Decretum est per Thomam Crumwell, Armigerum, Magistrum Rotulorum Regis, signed Thomas Crumwell.*

That there is in one of the bundles in the Tower a Parchment directed to *Crumwell, as Master of the Rolls, and also as the King's principal Secretary of state*, with such recital, and such indorsement, is true; but that this was either a cross Bill, or the other complaint an original Bill, that is no where there said; but it was the custom on some occasions in those times, when business was not great, on complaint of the Parties, not to issue process, but for the Chancellor or Master of the Rolls to send letters, and if they willingly complied, then there was an end of the matter; but if they did not, then the party prefer'd his Bill, and took out process. There was the same practice in the Exchequer, as may be seen in a printed Book, *anno 1658. intituled, The practice of the Exchequer court, &c. written at the request of the Lord Buckhurst, some time Lord Treasurer of England, p. 8.* where he mentions the method of writing of Letters and after-Process, which then had
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been

been few of late years, and found almost fruitless, for *super debile fundamentum cadit opus.*

In this case it is the same in the *Petition* directed to the Master of the Rolls, which the Author calls a *cross Bill*. Sir *Richard Houghton*, the Petitioner, sets out, that *George Walmsley*, and *Clemence* his Wife, had complained to the Master of the Rolls, that the said *Richard Houghton* had unjustly expell'd them out of a House or Tenement; whereupon his good Mastership directed his *Letters* to the said suppliant, to suffer the said *Walmsley* to enjoy the said Tenement, or otherwise to appear before the Master of the Rolls, *where-ever he was*, immediately after the receipt of the said *Letters*: And thereupon, because it wou'd be chargeable to come to *London*, where the Master of the Rolls was, to declare his title to the premises, and that he wou'd not offend the *tenor of the said Letters*, had hitherto suffer'd the said *George* and *Clemence* to occupy the said Messuage and Tenement, which he affirms to be his rightful inheritance, and will in no ways expel them therefrom, until the truth of his title might be fully heard and determined: So that it might appear as well to the Master of the Rolls as to others, that he hath done no wrong to the said *George* and *Clemence*, and therefore prays the Master of the Rolls to award a commission to such persons

persons as he shall approve of, and appoint them to call before them the Petitioner and the said *George* and *Clemence*, and enquire as well of their title to the premises, as of their demeanor, and finally to determine all matters between them, or otherwise to certify to the Master of the Rolls what they do in the premises. On the back of this Parchment is indors'd, *Decretum est per Thomam Crumwell*. To this Parchment is annex'd another which is the certificate of the commissioners, by which it appears that *George Walsley* was then dead; and they return the examination of *Clemence* and several Witnesses; but what was done on the return of this commission, doth not appear. Here was no *Bill* or *Subpæna*, only *Letters* directed by the Master of the Rolls to the party, to do what was desir'd by the other party, or to appear not in Chancery, but *before the Master of the Rolls, wheresoever he was*. The power of *Crumwell* was then very great, but yet *super debile fundamentum cadit opus*.

In the 2d chapter of this Treatise, p. 4. it is brought for a proof of the Chancellors being the sole Judge in Equity, that all Judgments or Decrees of the court are given by him, except when he is a party to the suit; and that even in the enrollment of all Decrees at the Rolls, or by the Master of the Rolls, the entry is, That *it is order'd, adjudg'd, and decreed, by the Lord Chancellor*.

This is a fact that cannot be denied by the Author; but to avoid the force of it, he insinuates the words of the enrollment *to be only words of ' form in the conclusion*; because in the Decrees drawn up at the Rolls, and in the Doquets of the intended enrollment of such Decrees, it is recited, that *the cause came on to be heard before the Master of the Rolls*: And in the decretal part of such Order, it is sometimes thus, *His Honour doth^u order and decree*; and sometimes thus, *This court doth order and decree*; but generally *His Honour doth^w order and decree*.

It wou'd be an infinite and endless task to look over all the enrollments of Decrees in the court of Chancery, or to account for every particular form that may be there us'd: Every clerk there follows his own form; but I may venture to say, that till now lately, that a particular and *remarkable* care hath been taken in this matter, which the practicers well know, the general way of drawing up or entring Decrees made at the Rolls, was not as made by the Master of the Rolls, but by the *Court*, or by the *Chancellor*. In the Book, intituled, *Certain Observations concerning the Office of Lord Chancellor*, said to be compos'd by the Lord *Elsemere*, and cited by the Author, p. 107. it is said, *that the Decrees made by the Master of the Rolls, are enter'd*

* P. 124.

* P. 117, 119.

* P. 123.

either *per Curiam*, or *per Cancellarium*, i. e. are enter'd to be made either by the Court, or by the Chancellor; and this I believe is known to have been the general usage both ancient and modern, till of late years: I have seen several precedents of this kind, both in the time of Lord Somers, and of Sir Nathan Wright: Some of the entries are in this form, --- And the said cause being thus ready for a hearing, Tuesday the ---- day of ---- was appointed for the hearing thereof in open court; on which day the said cause coming on accordingly to be heard and debated, --- whereupon, and upon debate of the matter and hearing what was alledg'd on both sides, this court declar'd: And it is therefore this present day, that is to say, Tuesday the ---- by the Right Honourable John Lord Somers, Baron of Evesham, Lord High Chancellor, order'd, adjudg'd and decreed. Other entries of Decrees at the Rolls, I have met with in this form. On which day, being the ---- day of ---- the said cause, coming on accordingly to be heard and debated before the Right Honourable the Master of the Rolls, whereupon, and upon debate of the matter, and hearing what was alledg'd on both sides, this Court doth think fit, and so order and decree: And it is therefore this present day, that is to say, the ---- day of ---- by the Right Honourable John Lord Somers, Baron of Evesham, Lord High Chancellor, --- order'd, adjudg'd and decreed, that, &c. The

reason of entring into this method, seems to have been for the preservation of the unity of the court, and for curing any defect or irregularity in the proceedings under the commission, which cou'd not be alledged when the Decree appears to be made by the court.

The Author hath likewise another notion that this enrollment of the Decree, as decreed by the Lord Chancellor and the court, ** imports no more than a Warrant to carry the Decree into execution by the Great Seal---* For when the Decree and all the Orders subsequent to it, are recited in the enrollment to have been made by the Chancellor himself, the clause is always added at the end of it ;--- but in this last case it is obvious to every one that the use of these words cou'd not make it the Chancellor's Decree, and therefore they must be inserted for some other purpose.

The purpose of inserting these words is easy to be discover'd by a common Reader: When the Chancellor himself first makes a Decree, it is properly the Declaration of his judgment, and is not a perfect and compleat Decree before the enrollment; for till that time he may rehear, alter, change, or reverse; it is not his final absolute judgment till enroll'd: and therefore being made so by the enrollment, it is proper and necessary that at the end of every enrollment, even

of the Chancellor's Decrees, there shou'd be the same usual clause; *It is order'd, adjudg'd, and decreed, by the Lord Chancellor, and by the high and honourable Court of Chancery, that, &c.* For it is *that* which makes it a *compleat* and *final* Decree of the Court, after which there is no method to redress any error therein, but by Bill of Review, or Appeal.

There is another reason also, alledg'd by the Author, to show that this enrollment of the Decree, as decreed by the Lord Chancellor, and the Court, imports no more than a Warrant to carry the Decree into execution by the Great Seal; — *When a Decree is made by Commissioners appointed by a special commission, to hear causes in absentia Cancellarij, the same clause is inserted: But no body will say it is necessary in order to give authority to their Decree; for they have, by express words of the commission, full power granted to them to make all Orders and Decrees: Therefore the authority of their Decrees arises out of the commission, and not from any operation of those words in the enrollment, to make them become the acts of the Chancellor.*

The same answer that hath been given to the enrollment of the Chancellor's Decrees, may be given to the enrollment of the commissioner's Decrees, with this additional an-

swer, that by the exprefs words of the commission, ² *None of their Judgments or final Decrees are to be enroll'd, or any ways executed, before the Chancellor or Keeper sign them with his own hand.*

And it is plain that this method of entring the final and perfect judgment in the enrollment upon all manner of Decrees, by whomsoever and howsoever made, *to be made by the Chancellor*, was to preserve the unity of the court, and that there shou'd not be in the *Records* of the court any judgment that was not given by the *Judge* of the court.

The Author writes, in p. 92, 93. *That the judicial acting of the Master of the Rolls was not confin'd to the exercise of the ordinary powers of the court of Chancery, but extended it self to extraordinary powers given to that court by Act of Parliament, unless in cases where such powers have been given personally to the Chancellor:* For which he instances in two late Acts of Parliaments, ^a 7 *Anna*, cap. 19. & 8 *Geo.* ^b cap. 23. where particular powers given to the court of Chancery have been exercis'd by the Master of the Rolls. It is not to be expected that I should account for every excess of power which often slides in insensibly, and without being at first ob-

² Quodque nulla eorundem Judiciorum sive final' Decretor' irrotulentur, aut quovismodo executi sint antequam idem ——— Manu sua propria similiter consignet.

^a P. 94.

^b P. 95.

served; or give a reason why in cases of the same nature the Master of the Rolls exercises a power in one, and not in the other.

The two instances given under this head by the Author, are late and modern ones, but yet there is a later, wherein the Master of the Rolls hath not exercis'd a special power given to the Court of Chancery, *viz.* determining the *claims* of the *Suitors* of that court, upon the offices of the *deficient* Masters, pursuant to the Act made last Session of Parliament, for *relief of the Suitors of the High Court of Chancery*. Now if it be a general Rule that where an *extraordinary* power is given by Act of Parliament, to the *Court of Chancery*, the Master of the Rolls *may* execute it, who can assign a reason why the Master of the Rolls shou'd *exercise* such special power *under one* Act, and not exercise a *like* special power under *another*?

The Author's affirming *that the judicial acting of the Master of the Rolls extends it self to extraordinary powers given to the Court of Chancery by Act of Parliament, unless in cases where such powers have been given personally to the Chancellor*, is an admission that powers of this kind do not belong to *him*, but to the *Chancellor* personally: Now if his own affirmation be true, I would ask him how, or by what authority the Master of the Rolls exercises one of the greatest powers given to the Chancellor, and without which,

which, the Chancellor's jurisdiction wou'd not be of the weight and force it hath been? and that is the *giving of costs*, which by the Act of Parliament, 17 Ri. 2. is personally given to the Chancellor? Or by what authority it is that the Master of the Rolls doth, 'as the Author writes, *make Orders for admitting Parties in a cause to sue or defend in forma pauperis*? Seeing that is a *special power* given by the 11 H. 7. cap. 12. to the Chancellor personally. But some things will be *better* pass'd over in *silence*, than be *nicely* or *critically enquired into*.

Another of the Author's proofs for the judicial authority of the Master of the Rolls, is ^d taken from the *General Orders in Chancery, made for regulating the practice, and directing the behaviour of the officers of the court, distinguish'd by having Ordo Curiae written in the margin of them*; which as they have been made by Chancellors, so the Author saith have also been made by the *Master of the Rolls, and by the Chancellor and the Masters of the Rolls in conjunction*.

It is certain, that the ancient Orders of the court were ordained or made by the Chancellor or Keeper only; and the Author doth not insinuate any one instance of this kind older than the year 1596. and there is only *guess-work* and *imagination*. The ac-

count he gives of this matter, is, ^e that there were Ordinances agreed upon by the *Lord Keeper Puckering*, and *Sir Thomas Egerton*, *Master of the Rolls*, in April 1596. which, if the death of the then *Lord Keeper* had not prevented it, wou'd, as the Author saith, doubtless have been publish'd as the Ordinances or Orders of both those great men. But how the Author came to be so sure, that if *Puckering* had lived these Ordinances wou'd have been publish'd as Ordinances both of him and *Sir Thomas Egerton*, I cannot tell. I am sure of this fact, that when they were first publish'd, they were publish'd as the Ordinances ^f of *Sir Thomas Egerton* only; and supposing that in *Puckering's* life-time these Ordinances had been agreed upon between *Puckering* and *Egerton*, doth it therefore doubtless follow, that if *Puckering* had lived to publish them, he wou'd have done it as the Ordinances of both of them? It is much more probable and natural to imagine, that if he had lived to publish them, he wou'd have follow'd the examples of his predecessors, and the course of the court, and have publish'd them in his own name, or as his Ordinances only.

^e P. 106.

^f Ordinances provided in *Easter Term*, anno 58 *Eliz. Reg.* by the right honourable *Sir Thomas Egerton*, Knt. Lord Keeper of the Great Seal of *England*, for the remedy of sundry abuses in the Court of Chancery at *Westminster*, May 24. 1596.

As the Author hath not given any one instance of this kind before the year 1596. and hath fail'd in that, so neither hath he cited any of the particular instances that have been since: When those are produc'd, their dates, their subject matter, and other circumstances will also appear; and then a particular answer may be given them, but cannot particularly be till then: Only this may be now further added, that it will deserve the Author's consideration whether such Orders, whatever they may appear to be, must not ultimately refer to the authority of the Chancellor, and be approv'd of and establish'd by him, before they can possibly be put in execution.

The Author, towards the close of the 5th section, intimates, & that there are some instances of great weight, which not properly falling under the branches of the said section, he gives them there a place by themselves.

The first which he mentions is that of *Causes wherein the Chancellor for the time being hath been a party, which have been brought to hearing before the Master of the Rolls; in which cases, the Author saith, his judgment must of necessity be final in the court of Chancery.* But this is an averment against a known fact, unless in the instance of the late Earl Cowper, which shall presently be accounted for. The final Decree in these cases is *by the King's*

most excellent Majesty, in his high court of Chancery, as the Author himself in effect owns in the next page.

But the Author saith, that the ^h Authority of the Master of the Rolls to make such Decrees, cannot be derived from any special commission to hear and determine causes in absentia Cancellarij; for a power to hear causes in the Chancellor's absence, can extend only to such causes as he cou'd hear, if he were present. This is *gratis dictum*; the authority of the Master of the Rolls, and the Masters under the commission, is to hear and determine all matters and causes in the absence of the Chancellor, without any distinction; there is no difference in the commission between one cause and another, and therefore the Master of the Rolls, and the other Masters, may, by virtue of the commission, hear a cause in the Chancellor's absence, wherein the Chancellor is a party. But then it is to be admitted to the Author, that the signing and enrollments which are necessary to make it a final and absolute Decree, cannot be made by the Chancellor, because that wou'd make him a Judge in his own cause; for which reason, and because there is no other Judge in this court but the Chancellor, this final judgment must of necessity be supply'd by the King's immediate personal authority: And therefore

not only ¹ sometimes, but I believe always, except in the late case of Earl Cowper, the Decree in such cases hath been *signed by the King*. And the enrollment has concluded, that *It is order'd, adjudg'd and decreed, by the King's most excellent Majesty, in his high court of Chancery, that, &c.*

The Author indeed asserts, ^k that *the inserting the King's name in the enrollment, cannot make it become the Decree of the court of Chancery, since there is nothing better known than by the law of England the King gives judgment only by the Judges*. This law of *England* is so in courts where the King hath Judges capable by law to act; as for instance, in the King's Bench, where the proceedings are *coram Domino Rege*, the rule or judgment is given by the Judges; there the King hath four Judges; if one of them be a party to a cause in that court, that Judge himself cannot judge therein, but there are three Judges besides, who may hear and determine it: But in Chancery there is no other Judge but the Chancellor, and therefore when he is disabled by law from acting in a particular case, by his being party, the King of necessity, to prevent a failure of justice, must interpose and judge in the cause. This is the law of *England* as to this court, and the constant practice and usage shows it; and there-

¹ P. 130.

^k P. 131.

fore it was too hastily affirm'd by the Author, *that the inserting the King's name to the decreeing part in the enrollment, cannot make it become the Decree of the court of Chancery, since the Records and Entries of the court, and the uniform practice of all times, show the contrary.*

This is an additional argument that the Chancellor is *sole* Judge in the court of Chancery, because if there were *any* other Judge in this court, *that Judge*, as in other courts where there are more Judges than *one*, wou'd finally determine in cases where the Chancellor is *disabled* by *being* a party; whereas now for want of another Judge, the King himself immediately *intervenes* and decrees by his personal authority.

The Author in the continuation of his discourse on this head, informs the world that *There is a precedent in the case of a Chancellor of great reputation, viz. the late Earl Cowper, who brought a Bill in the year 1767. when he had the custody of the Great Seal, against William Mackintosh and his Wife, to foreclose the equity of redemption of a Mortgage, and brought the cause on to hearing, before Sir John Trevor, then Master of the Rolls, who sitting alone, made a Decree for sale of the mortgag'd estate, which Decree was sign'd by Sir John Trevor only, and thereupon enroll'd; and the enrollment concludes, that it*

is order'd, adjudg'd and decreed, by the Right Honourable Sir John Trevor, Knt. Master of the Rolls, and by the high and honourable court of Chancery, that, &c. And then the Author leaves it to any body to make good this Decree, otherwise than by the authority belonging to the Master of the Rolls; and yet that noble and learned Lord became a purchaser of the lands under that Decree.

If all these facts are true, and the late Earl Cowper knew them to be so, it will much tend to diminish, in the minds of people, the opinion deservedly entertain'd of his great abilities and understanding.

He could not but know that his own Bill was directed to the *Queen's most excellent Majesty, in her high court of Chancery*; that he had therein laid his case before *Her*, and pray'd process and relief from *Her*. He must have known that by the tenor of the commission, the *Master of the Rolls* cou'd not hear and determine a cause *without two* joining with him; and that in the enrollment of Decrees of this nature, the common entry was, that *It is order'd, adjudg'd and decreed, by the Queen's most excellent Majesty, in her high court of Chancery.*

Now to suppose that this noble and learned Lord should know all this, as most certainly he did, and at the same time *know* that the Decree in his cause was *made and sign'd* by the Master of the Rolls *alone*, and enroll'd

enroll'd as his Decree only, to *whom* no Bill was *address'd*, nor from *whom* any thing was *pray'd*; and after *all* this, act contrary to his own knowledge and conviction in these things, and *become* a *purchaser* of lands *under* such a Decree, is not only inconceivable, but what every one, upon the first view, must needs think the late Lord *Cowper* cou'd not possibly be guilty of: But this happens to be a recent fact, and of which a good account can be given.

The lands purchased at this time by the noble Lord, being subject to a Mortgage, and other estates and interests, an Act of Parliament pass'd in the 5th and 6th years of the late Queen, whereby those lands were vested in Trustees, to be sold for the best price that cou'd be reasonably got, in order to pay off the Mortgage, and then in trust to lay out the residue of the money in the purchase of other lands, to be settled in such manner as by the act was appointed, and in the mean time to place out such residue at interest, payable as the act directs; and all purchasers under the act were quietly to enjoy the premises by them so purchas'd.

When this estate came to be sold under this Act of Parliament, the noble Lord treated for it, and the *Trustees* cou'd have made him a *good title* under the Act of Parliament, without any *more a-do*. But it was *thought* convenient, for the *sake* of the Trustees, and of *those* who

were intitled to the residue of the money, that a Bill in Chancery shou'd be brought against the Trustees; and thereupon, by *common* consent, a Bill was brought in Chancery by Lord Cowper: The cause was in fact heard at the Rolls, before the Master of the Rolls only; whereon a sale, &c. was decreed. When the decretal Order made at the Rolls was drawn up and deliver'd out to the parties by the Register, it was brought to Lord Cowper, who then *objected* to the Order, that it was *defective* and *incompetent*, for want of *two* Masters *joining* with the Master of the Rolls. This, if there be occasion, will be testify'd by a person of undeniable honour and integrity now living: But besides that, there is *unquestionable* evidence in writing, that this was so: For tho', as the Author writes, this cause was heard at the Rolls, by the Master of the Rolls sitting alone, yet on the draught of the decretal Order there is endorsed by Mr. Marshall, the Earl's Secretary, this direction, To Mr. Price, the Register.

Mr. PRICE,
To name two Masters to this Decree, Dr.
Edisbury, and a Master, for the day.

And according to this direction, by the Earl's Secretary, Mr. Price put the names of two Masters to the decretal Order, in the usual manner that the Masters names are put
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when a cause is heard before them and the Master of the Rolls; which Order may be easily seen by the Author, whenever he pleases to take the trouble.

There was not only care taken to draw up the decretal Order, as made before the Master of the Rolls and two Masters, but all the subsequent Orders for confirming the Masters Report, down to the time of the conveyance to the Lord Cowper, are all, without exception, made by the authority of *two Masters*, as well as of the *Master of the Rolls*; and the several Orders in this cause precedent to the conveyance to Lord Cowper, are in the conveyance particularly recited: But there is not the least notice taken therein of the signing and enrolling the Decree, neither indeed cou'd there be; because the conveyance to Lord Cowper was made *many months before* the Decree was *actually* sign'd and enroll'd.

From the time the conveyance was made to my Lord Cowper, he was out of the case, and had no further concern in it: Those who carried on the proceedings afterwards, were the other parties to the suit, for their own distinct benefit and interests; and it cannot be suppos'd that his Lordship, who took so much care before his conveyance to have the proceedings regular, shou'd after his conveyance, when he had nothing more to do in the cause, know any thing of the irregular manner of signing and enrolling the Decree,

especially when it is not only contrary to the establish'd course in such cases; but also contrary to the rules of common sense, that on a Bill *directed* to the Queen, the Master of the Rolls shou'd decree, and *not* the Queen, from whom *only* relief was pray'd. I believe my Lord *Cowper* wou'd as soon have allow'd as good and legal, a Decree made by the Barons of the Exchequer, upon a Bill in Chancery, as a Decree made by the Master of the Rolls, upon a Bill address'd to the Queen.

The Right honourable the Lord Viscount *Harcourt*, successor to the Lord *Cowper*, had also a suit whilst he was Chancellor, depending in the court of Chancery, which was carried on to hearing, and heard before the Master of the Rolls and two Masters; and the Decree was afterwards signed by her late Majesty, as by a memorandum of it, in a Book at the Rolls, may be seen. From the two precedent cases of Lord *Cowper* and Lord *Harcourt*, it is evident, that the opinions of those two great and learned Chancellors concurr'd in this, that the Master of the Rolls cou'd not make a Decree without the assistance of two Masters.

The instances the Author next considers, are, as he ^m saith, *of a higher nature, because they carry along with them not only an affirmation of the judicial power of the Master of the Rolls by the Chancellor, but also by the royal authority, and that by express words.*

These instances are two special commissions granted for hearing and determining matters and causes in Chancery, the one in the 35 and the other in 38 *Eliz.* both which are printed by the Author, p. 133.

In the commission bearing date the 22 *Jan.* 35 *Eliz.* the Queen recites the necessary avocations of Sir *John Puckering*, Lord Keeper, by his attendance in the Star-chamber, and application by the Queen's commandment, to publick affairs; so that *ea quæ in Curia nostra Cancellariæ in causis & materijs inter diversos ligeos & subditos nostros ac alios ibidem penden', tractand', audien d', discutiend' & terminand', sint & fieri debent diversis vicibus intendere minime queat.* *Ac pro eo quod dilectus & fidelis noster Gilbertus Gerrard Miles, Custos & Magister Rotulor' dictæ Curie Cancellariæ nostræ adeo languidus & impotens corporis sui existit, quod ea quæ ad officium suum in præmissis pertinent ad præsens exequi non valeat.* Therefore the Queen *præmissa Considerantes*, and that full and speedy justice might be done in Chancery, *tam in absentia quam in præsentia præd' domini Custodis magni sigilli*, authorizes four Judges and seven Masters of Chancery, or any three of them, whereof a Judge to be one, to hear, examine, and determine, all matters and causes in Chancery: And so goes on in the form of the past commission, with the usual proviso, that none of their Decrees shou'd be

enroll'd before they were sign'd by the Lord Keeper. And then follows another proviso, *Proviso semper quod quandocunque præd' Magister Rotulorum, aut aliquis alius qui ad officium illud per nos imposterum electus, nominatus & assignatus fuerit in plenam curiam Cancellariæ nostræ prædictæ ad ea quæ ad idem officium pertinent exequend', & performand' accesserit ac personaliter interfuerit & intenderit*; Or the Queen shou'd think fit to ordain otherwise, that from thenceforth these Letters Patents shou'd cease.

The second commission bears date the 18 May, 38 Eliz. which was about five weeks after Sir Thomas Egerton, Master of the Rolls, was made Lord Keeper; and he being both Keeper and Master of the Rolls, cou'd not, without a contradiction, have pass'd a commission to the Master of the Rolls, to hear causes in the absence of the Keeper: And therefore the commission that then passed the Seals, was in the common and usual form, to four Judges, and seven Masters, or any three of them, whereof a Judge to be one, to hear and determine causes in the absence of the Keeper: And at the end there is this clause, *Proviso semper quod quandocunque aliquis alius ad officium prædictum, Magistri Rotulorum, per nos imposterum electus, nominatus & assignatus fuerit in plenam curiam Cancellariæ nostræ prædictæ ad ea quæ ad idem officium pertinent exequend', & performand' accesserit ac*
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personaliter interfuerit & intenderit, that then the commission shou'd determine, and be void.

The Master of the Rolls was not in the first commission, because he was sick; and he cou'd not be in the second without a contradiction; because the same person who was both Keeper and Master of the Rolls, cou'd not, as Master of the Rolls, be *present* to hear causes, and, as Keeper, be *absent*.

Now these two commissions do, in the Author's opinion, carry with them an affirmance of the judicial power of the Master of the Rolls, both by the Chancellor, and by the Royal authority; and to make out this, he affirms in p. 137. *That upon these two commissions, the following observations do arise, That the only occasion of passing them was, that at those several times there was no Master of the Rolls able to attend the business of the court.*

That in the first commission it is expressly affirmed, that it belonged to the office of Master of the Rolls to hear and determine causes in Chancery; for the words in præmissis, used in the recital, cannot have any other meaning, the hearing and determining causes being the only matter therein before-mention'd, which relates to the Chancery.

That by express proviso in both these commissions, the authority given by them, was to subsist no longer than until a Master of the Rolls could sit in court, and do those things that

that belonged to his office, which in the first commission is express'd, and in the second is necessarily implied to be the hearing and determining of causes there.

From all which it is plain, that these commissions were substitutions in the room of the Master of the Rolls, for the ease of the Lord Keeper, and that it was not then imagined that the Master of the Rolls wanted a special commission, when he sat either for the Chancellor, or at the Rolls.

Now whether either the premises, or the conclusion be right and true, let any man read, consider, and determine.

The first observation is, That the only occasion of passing these two commissions, was, that at those several times there was no Master of the Rolls able to attend the business of the court.

It is a strange observation that this was the only occasion, because it is directly contrary to the letter and words of the first commission; for the express considerations of that commission are not only the inability of the Master of the Rolls, by reason of his infirmity, to do the things relating to his office in the premises, but also the employment of the Lord Keeper in the Star-chamber, and in publick affairs, by the Queen's commandment; whereby at sundry times he cou'd not attend the causes and matters in Chancery. The Queen *præmissa considerantes*, taking all
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these things into her consideration, granted the first commission.

As to the second commission, the *non-ability* of any Master of the Rolls to attend the business of the court of Chancery, was so far from being the only occasion of it, that it is not so much as mentioned in the reasons for granting it: The only reasons mention'd in the commission it self, are the avocations of Sir *Thomas Egerton*, the then Keeper, in like manner as was mention'd with regard to Sir *John Puckering*, the then Keeper, in the first commission; and that the Queen considering these things, grants the second commission.

That which led the Author into this mistake, as to the second commission, seems to have been the proviso at the end of it, which is, in effect, the same with the proviso at the end of the first.

When the first commission was granted, Sir *Gilbert Gerrard*, the Master of the Rolls, was then infirm, and recited so to be in the Preamble of the Patent; and it is an intelligible proviso at the end of the first commission, that when the said Master of the Rolls, *i. e.* Sir *Gilbert Gerrard*, or any other who shou'd be thereafter named by the Queen to the said office, shou'd come into full court, &c. that then the commission shou'd cease.

But in the second commission there is no mention in the Preamble, who was then Master of the Rolls, nor so much as any mention
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of the office of the Master of the Rolls, till you come to the proviso, which is the last clause; and there the then Master of the Rolls is not mentioned, as he is in the first commission, but only *quod quandocumque aliquis alius ad officium prædicti Magistri Rotulorum*, &c. that when any other person to the *aforesaid* office of Master of the Rolls, nominated by the Queen, shall come into full court, &c. that then the commission shall cease, without mentioning before any other Master of the Rolls, to whom the *aliquis alius*, or other person, shou'd refer; and without mentioning before the office of Master of the Rolls, to whom the *aforesaid* office shou'd refer.

This shews plainly that the person who drew this second commission, was only an unskilful copyist from the former; for leaving out of the body of the Patent, and also out of the Proviso, what personally related to Sir Gilbert Gerrard, which cou'd not belong to Sir Thomas Egerton, as Master of the Rolls, he transcrib'd the rest of the Proviso *verbatim*, without accommodating it to matters as they then stood; and as it stands in this manner, is, at the best, blundering and obscure.

The Author's second observation, which is in p. 138. is confin'd to the first commission, and that is, *That in the first commission it is expressly affirmed, that it belonged to the office of the Master of the Rolls, to hear and deter-*
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mine causes in Chancery; for the words in præmissis, used in the recital, cannot have any other meaning, the hearing and determining causes being the only matter therein before-mentioned, which relates to the Chancery.

I do not find that it is any where expressly affirmed in the first commission, that it belonged to the office of the Master of the Rolls, to hear and determine causes in Chancery, sit liber Judex; and if there be none such, the Author shou'd not have been so positive.

There is a great difference between an express affirmation of a thing, and an inferring it from premises, tho' never so evident; and therefore this being *not* expressly affirmed, it can only be the Author's inference, that it belonged to the office of the Master of the Rolls to hear and determine causes in Chancery: And this seems to be what the Author meant by an *express affirmation*; because he adds, *For the words in præmissis, used in the recital, cannot have any other meaning, the hearing and determining causes being the only matter therein before-mentioned, which relates to the Chancery.* But this inference fails as well as his *express affirmation*, because it is founded upon two suppositions, that the hearing and determining causes, are the only matter therein before-mentioned, which relates to the Chancery; and that the words in *præmissis*, refer to the whole recital relating to causes in Chancery; in both which,

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the Author is mistaken. The bare hearing and determining of causes, or the making decrees in causes, upon hearing, are not the only matters relating to the Chancery, comprized in the commission; the words of the commission are, as may be before seen, that the Lord Keeper has so many avocations, that several times he cou'd not attend to those things which, in causes and matters in the court of Chancery, shou'd and ought to be *handed, heard, discuss'd and determined*. This takes in the whole progress of causes from the beginning to the end, all the intermediate as well as the final Acts, as is more particularly express'd in the body of the commission it self; so that the bare hearing and determining of causes is not the only matter therein before-mentioned, relating to the Chancery, but in *the premises* are contain'd all the interlocutory Orders, as well as the final hearings and determinations.

The next question then will be, whether the words in *præmissis* do so refer to the whole recital, as to show that the hearing and determining of causes in Chancery, doth belong to the office of Master of the Rolls: For this the Reader must turn his eye back upon the commission, and he will find the recital to be, that because Sir *John Puckering*, Lord Keeper, cou'd not at divers times attend *those things, which in causes and matters depending in Chancery, shou'd and ought*

to be handled, heard, discuss'd and determin'd: And because that Sir Gilbert Gerrard, Master of the Rolls, was so weak in body, quod ea quæ ad officium suum in præmissis pertinent ad præsens exequi non valeat, that those things which belong to his office in the premises, he cannot at present execute; therefore the Queen grants the commission.

Here is no determination of what particular part of the premises belong to his office, much less is there any determination that the hearing and determining of causes belonged to his office. It hath been already shown in this Treatise, that by communication of the Chancellor's authority, and by establishment from him, some part of the premises, as the making interlocutory Orders, did belong to the office of the Master of the Rolls; and some part of the premises, as the hearing and determining of causes, did not belong to him: Therefore when the premises contain both, and the recital is, that the Master of the Rolls cannot attend to do these things which belong to his office *in the premises*, can that be understood of any other part of the premises than that which belong'd to his office? This is the grammatical construction of the words, and the natural construction of the Patent, which can't well be understood in any other sense; for if the Master of the Rolls had had power to do all the premises, the Patent, one would think, then

then shou'd have been, that the Queen was willing to do justice not only in the absence as well as presence of the Lord Keeper, as now it is, but also in the absence as well as presence of the Master of the Rolls.

The Author's third observation in p. 139. is, That by express proviso in both these commissions, the authority given by them, was to subsist no longer than until a Master of the Rolls cou'd sit in court, and do those things that belonged to his office, which in the first commission is expressed, and in the second is naturally implied to be the hearing and determining of causes there. The proviso is, That whensoever a Master of the Rolls shou'd come into the full court of Chancery (which is not the Rolls) to execute and perform those things that belong to the said office, and be personally present, and attend it, that then the commission should cease; but that the things that belonged to his office, are in the first commission express'd, and in the second necessarily implied to be the hearing and determining of causes in Chancery, is only the Author's affirmation, and, as hath been before shown, is neither express'd in the first, nor implied in the second commission.

The Author being thus shown to be mistaken in every one of his three observations, his inference from them in p. 139. falls of course, that from all which, i. e. these observations, it is plain, that these commissions were substitutions

tutions in the room of the Master of the Rolls, for the ease of the Lord Keeper, and that it was not then imagined that the Master of the Rolls wanted a special commission, when he sat either for the Chancellor, or at the Rolls.

Whatever may be the reason or construction of the first commission, the second can add nothing to the weight of it, because that contains only a copy of the proviso from the first transcribed in a confus'd and blundering manner; so that this in effect stands only on the first commission; and tho' no clear account could be given of it at this distance of time, it could be of no great consequence, because there is no instance of the like nature either before or after, and it cannot reasonably be put in competition with a different method constantly and invariably used for 120 years since.

But a plain account may be given of it: The Master of the Rolls was the first and chief assistant to the Chancellor, in the affairs of Chancery, whether there *was* or was *not* a commission; and it was *part* of his *duty* to *assist* the Chancellor in *either* method. The Judges in *Westminster-Hall*, are by their offices only Judges of their respective courts; but yet by usage and custom it is become part of their duty to accept and act under all the ordinary commissions of *Affize*, *Oyer* and *Terminer*, and *Gaol Delivery*; in like manner it was the duty of the Master of the Rolls

to *assist* the Chancellor, as well *under* a commission, as *without* it. Now in this case, the Chancellor, by reason of other avocations, being not able to do what belonged to him, nor the Master of the Rolls, by reason of bodily infirmity, to do what belonged to him, therefore during the absence of the Chancellor, and the infirmity of the Master of the Rolls, the Queen appointed *commissioners* for the *examining*, *hearing*, and *determining* matters and causes in Chancery; but when the *infirmity* of the Master of the Rolls shou'd *cease*, and *he* or any *other* future Master of the Rolls shou'd come into court, and be personally present there, that then the commission shou'd cease and determine.

This is a natural and easy account of these two commissions, and this proviso might then be thought reasonable, because when the disability of the Master of the Rolls, the first and chief assistant of the Chancellor to do his duty, was removed, it was proper that he shou'd then be let into the possession and exercise of all that judicial power, that the Chancellor's *other* assistants were *entitled* to, which cou'd not be but by determination of the commission, on determination whereof, all things might be transacted according to the strict constitution of the court, or a new commission might be granted, wherein the Master of the Rolls might be the first, as usual.

I fear

I fear the Reader is by this time tir'd with these remarks on the Author's discourse; more might be added, but having said enough to set this matter in a clear light, I shall here stop, especially seeing there is nothing material advanced by the Author, but what hath been either directly answer'd, or to which the Reader may give an answer himself, from what hath been laid down and proved in this Treatise.

CONCLUSION.

I HAVE now finish'd my *present* thoughts on this subject, and have propos'd them to the world, with that *fairness* which an affair concerning publick justice does require: By the search which I have made into these matters, I have great reason to think that more materials of consequence and moment for establishing the propositions in this Book, may still be found by those who have inclination to search for and collect them: But I think sufficient has been said to make it evident that the exercise of judicial authority by the Master of the Rolls, sprung either from the Crown or from the Chancellor, in aid and assistance of the Chancellor.

If the proof hereof was less considerable than it is, yet the very nature of the judicial power exercis'd by the Chancellor, shows it to be in aid of, and dependent upon him. It is not pretended that the Master of the

Rolls is a subordinate Judge, to hear *all* the causes of the court, but only *some*; nor to exercise judicial authority in *all* the parts of business of the court, but only *some*. It is not pretended that the Master of the Rolls can make any Order or Decree whatsoever, which may not be revers'd or alter'd by the Chancellor: And it is admitted that the Master of the Rolls cannot compel obedience to his own orders; and that none but the Chancellor can do it: let any indifferent person judge whether the nature of this judicature doth not show it to be entirely contrived for the aid and assistance of the Chancellor.

Considering the antiquity of the Court of Chancery, the scarcity and want of the ancient proceedings in that Court, and the voluminousness of the later Registers, which deter a person from looking into them; and adding to this the nescience, mistakes, and designs of such numbers of persons, clerks and others, as are concern'd in that court, it is matter of wonder, that the fundamental strokes and lineaments of the Court are to this time so well preserved, and that so good an account can be given of the ancient constitution of this Court, and of the several changes that have been in it; and it is not at all strange that particular times and occasions cannot be assign'd for the introducing of some things, which yet visibly appear to be deviations and irregularities.

Men

Men generally love increase of power, and very often gain it by degrees, when it is little perceived; the Masterhip of the Rolls hath been, for the most part, granted and enjoy'd for life, and many of the Masters of the Rolls have lived long in their office, and have had great experience and abilities in the business of the Court; the Seals have had quick changes and successions, sometimes before the Keepers of them had time to attain a thorough knowledge of the nature and course of the Court; and many things must necessarily have escap'd or pass'd unobserved in the crowd of business presented to them by the clerks, as of course. All these things being consider'd, it will be no wonder if some judicial acts have been exercis'd, which cannot be justify'd; but such examples cannot give or establish a right.

No man can be the Judge of a Court, but by authority from the Crown, or prescription, which supposeth it; the Master of the Rolls hath no such power or authority granted him by his Patent, nor is it contained in his Oath of office; nor can he, as to the equity part of it, have the least colour or pretence to a prescriptive right; because the whole jurisdiction of equity in the Court of Chancery, is, according to the notion and understanding of law, introduced into that Court within time of memory, as hath been shown in the former part of this Treatise: And it wou'd be a very *odd* constitution, that the supreme Judge

of the Court shou'd be always at the King's will and pleasure, and the *subordinate* one, for his own *life* absolute.

The Author, as hath been said before, admits that the Masters of the Rolls have acted under a commission from the King for 120 years, till within these two years last past: One wou'd think, according to the Author's own reasoning, that usage for a less tract of time, wou'd have put this matter out of question, and shown by whose authority he acted.

If within the compass of so many years some acts shou'd have been done by the Master of the Rolls, which, as things have been kept, do not appear to have been warranted by the commission, is it from thence to be inferr'd, that the continued series of acting under the commission hath been to no purpose, and for no end? Especially when for most of those acts which do not appear to be warranted by the commission, another legal method of doing them may be shown.

The Author insinuates, in the beginning of his Discourse, that *Whilst he is prosecuting his design* of establishing the authority of the Masters of the Rolls, according to his scheme, *he cannot but observe, with satisfaction, that he is defending the proper-*

ties of great numbers of his fellow subjects, which depend on the validity of Decrees and Orders made by Masters of the Rolls sitting alone; for if an opinion that those Decrees and Orders are nullities shou'd be set on foot, and obtain, a subversion of property, and confusion wou'd ensue. And in the conclusion of his Book he pathetically interrogates, *If that authority shou'd now be drawn into question, how extensive might the consequences be, with respect to the properties of great numbers of people? What wou'd become of the estates of those who have no other title to them, than as they hold and enjoy them under Decrees made by virtue of this authority? What wou'd become of the many purchasers who have bought estates under such Decrees? What wou'd be the fate of those Trustees, or others, who have their indemnity for conveying estates, or paying away great sums of money, from Decrees or Orders made by the like authority? What further inconvenience or confusion might ensue, the Author leaves to the mind of every man who turns his thoughts to this subject, to suggest to him.*

These are arguments to raise and work upon the passions of mankind, but not to inform or guide the reason; the question here is on a fact, whether the Master of the Rolls lawfully hath that power which the Author ascribes to him? It is no way of proving it,
to

to say, that unless the Master of the Rolls hath that lawful power, many people may be prejudiced and damaged by acting under it. The like reasoning doth not hold in other cases; *excesses* of power or jurisdiction generally come in by *degrees*, and may not be immediately taken *notice* of; and it is not *every* man will contend it. This is the daily case of prohibitions to Courts, for usurpation of jurisdiction; the like cases probably have several times before been determined by the same court, between other parties who have submitted thereto, but yet on application to a proper Court, by a person who is willing to contend it, that proper court will grant a prohibition for nullity of jurisdiction, and not be *deterr'd* by the consideration of the *inconveniencies* that this may produce, to persons who in former instances have *submitted* to, and acted under an *usurped* authority.

But in this case there is no fear of any of these inconveniencies: The *properties* of the fellow subjects will be as *safe* as ever; the Purchasers and Trustees will not be *subject* to any of that *hazard* or *confusion* which the Author so *tragically* describes.

Where the Masters of the Rolls have acted under commissions from the Crown, there the *Purchasers*, *Trustees*, and *Fellow-subjects*, are all *safe*; and if in any instances the Masters of the Rolls have made any Decrees not *warranted* by the commission, however weak
and

and sandy such Decrees may be in their foundation, yet having been signed and approved of by the Chancellor, which they must have been before they cou'd be enroll'd, they thereby become the acts of the Chancellor, and the Decrees of the Court: If before the hearing of a cause by the Master of the Rolls alone, the Chancellor had *referr'd* that cause to him, and he had *heard* and *reported* it, and the Chancellor had thereon *sign'd* it, *this* no doubt, according to the strictest constitution of the Court, wou'd have been a *good* Decree of the Court. The utmost that can be made of these other causes, is, that the Master of the Rolls, without a prior express reference by the Chancellor, hath heard them, and then certifies and reports them to the Chancellor, who confirms and signs them, and then they are *enroll'd* as the *judgment* of the *Chancellor*, and of the *Court*. A subsequent consent is of the same force and validity with a prior assent: So that the drawing into question the right of the Master of the Rolls, in order to reduce or confine his power within its lawful and just bounds, is *unattended* with any of those *frightful* consequences suggested by the Author: And if when these matters come to be look'd into, and an enquiry to be made, persons will go on with their *eyes* open, they must themselves answer for any consequences that may futurely happen. Tho'
the

the Chancellors have confirm'd past acts of the Masters of the Rolls, yet it cannot be reasonably expected that they shou'd go on and encourage future encroachments only to prevent future inconveniencies, which people are warn'd of before, and may avoid if they please.

But these matters will probably, in a little time, be more clearly explain'd. Matters of jurisdiction are merely points in law, and therefore proper for the consideration of my Lords the Judges; to whom, I have been inform'd, the Lord Chancellor hath sent a question of this nature for their opinion therein; which, no doubt, all persons will receive with that deference which is justly due to their high station and character.



N I S.

E R R A T A.

PAGE 29. Line 9. *for* only legal, *read* own regal. p. 33. for 13 R. 2. r. 17. p. 67. l. 23. for whereas, r. whereon. p. 76. l. 13 and 14. *dele* examined by them. p. 99. l. 8. for *manucaption*, r. *mansion*. the same, *ibid.* l. 26. p. 102. l. 1. for is, r. may be. p. 104. l. *penult.* for and, r. an. p. 190. l. 25. *dele* from. p. 212. l. 12. for they were, r. you are. p. 207. l. 5. *dele* if. and l. 8. *ibid.* for others, r. Authors. p. 212. in the margin, l. 6. for *issuit*, r. *issint.* p. 214. l. 14. *loco* the, r. judicial. p. 221. in the margin, l. 9. for *fil*, r. *fit.* p. 252. l. 29. for there, r. this.

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